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Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1798

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 30, 1978.

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported at 571 F2d 359, and are reproduced in the Appendix to this Petition at pp. 1-18 and 19-20. The order of the Court of Appeals denying the petition for rehearing is reproduced in the Appendix at p. 21.

The Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. Section 125.36(m), No. 42, including Attachment, appears in the Appendix at pp. 22-35. The Administrator's Denial of Petition for Review is reproduced in the Appendix at pp. 36-39.

Permit No. IN 0000132, Authorization to Discharge under the National Pollutant Discharge Elimination System, the final agency decision under review, appears in the Appendix at pp. 40-56.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1978 (App. p. 1). A timely petition for rehearing was denied on March 20, 1978 (App. p. 21). This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

A divided court below affirmed the decision of the Administrator of the United States Environmental Protection Agency granting a discharge permit under Section 402 of the Federal Water Pollution Control Act of 1972, as amended,[1] where the Administrator had failed to determine the meaning of a technologically based pollution control standard in Public Law 89-298[2] urged by petitioners to be more stringent than that required by Section 301(b)(1)(A)[3] and therefore binding on the Administrator under Section 301(b)(1)(C),[4] and the court substituted its own judgment for the expertise of the agency by interpreting the meaning of that standard and holding it not binding on the Administrator.

The question presented is whether the court's decision has so far departed from the accepted and usual course of judicial proceedings and the controlling decisions of this Court that review is warranted, especially in view of the ongoing harm to the National Pollutant Discharge Elimination System from the court's error which relieves the Administrator of strict compliance with Section 301(b)(1)(C).

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[1] 33 U.S.C. § 1342.

[2] Act of October 27, 1965, Title III—Rivers and Harbors, § 301; 79 Stat. 1073.

[3] 33 U.S.C. § 1311(b)(1)(A).

[4] 33 U.S.C. § 1311(b)(1)(C).

STATUTES, REGULATIONS, AND EXECUTIVE ORDERS INVOLVED[5]

Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 et seq.

Public Law 89-298, October 27, 1965, Title III—Rivers and Harbors, Sec. 301; 79 Stat. 1073.

The Refuse Act, 33 U.S.C. § 407.

Executive Order No. 11,574, December 23, 1970, 35 F.R. 19,627—Administration of Refuse Act Permit Program.

Regulations of the Environmental Protection Agency, 40 C.F.R. § 125.36(m).

[5] The relevant provisions of the foregoing, due to their length, are set forth in the statutory Appendix at the end of this Petition.

STATEMENT OF THE CASE

This proceeding was brought under 33 U.S.C. § 1369 and 5 U.S.C. § 701 et seq. to review final orders of the Administrator of the United States Environmental Protection Agency (1) denying review of the General Counsel's decision holding the pollution control standard of Public Law 89-298 inapplicable to effluent limitations in a discharge permit to Northern Indiana Public Service Company (NIPSCO) under Section 402 of the Federal Water Pollution Control Act of 1972, as amended (FWPCA), and (2) granting NIPSCO a Section 402 NPDES permit to discharge pollutants from its coal fired Bailly Generating Station into Lake Michigan at Burns Waterway Harbor adjacent to the Indiana Dunes National Lakeshore without requiring compliance with the standard of Public Law 89-298.

The Agency Proceedings

On October 31, 1974, the U.S. Environmental Protection Agency, Region V, issued an NPDES permit to NIPSCO to discharge pollutants from its coal fired Bailly Generating Station into Lake Michigan at Burns Waterway Harbor, in Porter County, Indiana, adjacent the Indiana Dunes National Lakeshore. At NIPSCO's request, on June 27, 1975 a notice of adjudicatory hearing was issued by EPA Region V to resolve certain questions about the permit. In response to the notice, petitioners filed a request for party status on July 28, 1975 which was approved on August 29, 1975. (App. pp. 2, 3)

As a result of a prehearing conference held November 12, 1975, the Administrative Law Judge certified to the General Counsel of EPA for decision pursuant to 40

C.F.R. § 125.36(m) an issue of law raised by petitioners involving the applicability of the following provision of Public Law 89-298 to the permit:

> ". . . . The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. . . ."

Petitioners contended that this provision set a higher pollution control standard than that proposed by the Administrator for NIPSCO's discharge permit. (App. p. 3). They pointed out that this provision grew out of the compromise in the contest over the use of the shoreline of Lake Michigan near Burns Ditch, Indiana. Industrialists proposed to develop the area as Burns Waterway Harbor. Conservationists sought to expand an existing Indiana State park and include the area in a proposed Indiana Dunes National Lakeshore Park. Between 1963 and 1965, both sides in this "port versus park" controversy compromised and agreed to the development of a public harbor and a national lakeshore. Legislation to this effect was introduced in both houses of Congress in 1965.

The Public Works and Interior Committees of each house held hearings and marked up legislation creating the port and park respectively. The Public Works Committees acted first, each house reporting out a bill authorizing the development of Burns Waterway Harbor. Although these bills did not contain specific language providing for control of pollution in Burns Harbor, they did authorize the development of the harbor under the "direction of the Secretary of the Army" pursuant to House Document 160. This document contained the recommendation of the Secretary of the Army that:

> "* * * the State of Indiana furnish assurances satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the harbor."

This language was written into the legislation as enacted. (App. pp. 8-10)

On June 9, 1976, the EPA General Counsel handed down a decision to the effect that Public Law 89-298 "has no applicability in establishing effluent limitations for the NPDES permit at issue" (App. pp. 4, 22-25), without a determination of the meaning of the above-quoted "maximum extent feasible" pollution control standard.

On July 6, 1976, petitioners filed a petition to the Administrator for review of the General Counsel's decision. The Administrator denied their petition for review in a decision dated August 10, 1976 (App. pp. 4, 37-40), again without a determination of the meaning of the "maximum extent feasible" standard.

On October 7, 1976, the Regional Administrator issued the initial decision authorizing the issuance of an amended NPDES permit to NIPSCO. The parties also entered into a stipulation at that time which resolved factual issues and preserved legal questions pertaining to Public Law 89-298.

On December 7, 1976, the Administrator, acting through the Director of Enforcement for Region V, formally issued the new NPDES permit to NIPSCO under the same number (No. 0000132) as the previous one. (App. pp. 5, 42-58)

The Proceedings Below

On November 8, 1976, petitioners filed their first petition (No. 76-2093) with the court below for review of the Administrator's August 10, 1976 decision denying review of the General Counsel's decision on Public Law 89-298. On March 7, 1977, petitioners filed their second petition (No. 77-1262) with the court below seeking review of the order of December 7, 1976 issuing the permit. The court ordered consolidation of these two appeals on May 9 and 16, 1977. (App. p. 5)

On January 30, 1978, the court below, by a divided vote, dismissed the petitioners' petition for review and affirmed the decision of the Administrator on Public Law 89-298. (App. 18)

The majority opinion pays lip service to Section 301(b)(1)(C) which provides that there shall be achieved:

> "(C) not later than July 1, 1977, any more stringent limitation including those necessary to meet water quality standards, treatment standards, or schedules of compliance, *established pursuant to any State law or regulations* (under authority preserved by Section 510) *or other Federal law or regulation*, or required to implement any applicable water quality standard established pursuant to this Act." (emphasis supplied)

The majority concedes that "If Public Law 89-298 had provided a precise standard and one more stringent than that required by FWPCA § 301(b)(1)(A), the court would have to direct the Regional Administrator of EPA to heed that stricter standard in the issuance of the permit to NIPSCO". (App. pp. 12, 13) Then, in the absence of a determination by the Administrator as to the meaning of the "maximum extent feasible" pollution control standard, the majority develops its own interpretation. It refuses to direct the Administrator to heed the

standard of Public Law 89-298 on the theory that the law "does not contain a specific standard", "does not confer authority in the Secretary to promulgate such specific standards", and "voices only a broadly stated objective which gives the Secretary . . . authority to exercise his discretion in obtaining assurances from Indiana of 'maximum feasible' pollution control in Burns Harbor". (App. pp. 10-13)

Chief Judge Fairchild, dissenting (App. pp. 19, 20), notes that the EPA considered the language of Public Law 89-298 inapplicable and ambiguous and never determined its meaning. He points out that EPA, without making that determination, cannot fulfill its duty under Section 301(b)(1)(C) to effectuate in Section 402 permits more stringent standards for pollution control, where created by other federal or state statutes, than "best practicable technology". Judge Fairchild would therefore set aside EPA's decision and remand for determination whether the effluent limitations in the permit fulfill the 89-298 language and, if not, for imposition of limitations that would do so.

REASONS FOR GRANTING THE WRIT

I.

THE COURT'S DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THE CONTROLLING DECISIONS OF THIS COURT THAT REVIEW IS WARRANTED.

As Chief Judge Fairchild noted in his dissenting opinion, the court majority below "adopts the view that because the 1965 language (of Public Law 89-298) is ambiguous it is not really a standard capable of enforcement" (App. p. 19) The majority, absent any technical determination by EPA, then goes on to interpret this "ambiguous" standard of "maximum extent feasible" and to hold it no different from the standard applied by EPA in issuing the NIPSCO discharge permit, stating:

> ". . . . We do not perceive that any difference in pollution control would result from enforcement of an objective to control pollution to the 'maximum extent feasible' on one hand and a standard (the standard set out in FWPCA § 301(b)(1)(A)) which establishes the 'maximum level of pollution allowable' on the other. *Thus, application of the objective stated in Public Law 89-298 would not result in the adoption of a standard more stringent than the applicable standards under the FWPCA.*" (emphasis supplied) (App. pp. 17, 18)

It is crystal clear that determination of the meaning of a technical standard such as "maximum extent feasible" is an administrative function involving the expertise of EPA. *American Meat Institute v. EPA*, 526 F.2d 442, 453 (7th Cir. 1975). The majority's intrusion into that determination which the agency alone is authorized to make was reversible error. *F.P.C. v. Idaho Power Co.*, 344 U.S. 20, 21 (1952); *Securities Comm'n. v. Chenery*

Corp., 318 U.S. 80, 88 (1942); *Ford Motor Co. v. Labor Board*, 305 U.S. 364, 373-374 (1939).

Nor can the administrative intrusion of the majority below be justified on the ground that Public Law 89-298 does not confer authority on the Secretary of the Army to promulgate standards, but merely left the matter of pollution control at the Harbor to his discretion (App. pp. 12, 15); and that the law has no application to EPA or to permits under FWPCA. (App. p. 14)

What the majority overlooks is the fact that when Public Law 89-298 was enacted in 1965, and subsequently, the Secretary of the Army already had pollution control authority and the power to issue permits under The Refuse Act (Section 13 of the Rivers and Harbors Act of 1899; 33 U.S.C. § 407). While the Secretary had no formal regulatory permit program, the water quality legislation of 1965 and 1970 limited his authority so as to require compliance with applicable water quality standards. The Refuse Act was upheld in the courts despite the lack of a formal regulatory program. *United States v. Pennsylvania Chem. Corp.*, 411 U.S. 655, 656, 36 L. Ed. 2d 567, 93 S. Ct. 1804 (1973); *United States v. United States Steel Corporation*, 482 F.2d 439 (7th Cir. 1973), cert. denied. 414 U.S. 909.

Executive Order No. 11574, 35 Fed. Reg. 19627 (Dec. 23, 1970) (Stat. App. pp. 15a, 16a) established a formal Section 13 permit program under the Secretary. Section 2 of the Executive Order required the Secretary to consult with the Administrator of EPA respecting "water quality matters", "regulations, procedures, and . . . applications for permits . . ." The Administrator was obligated to "make findings, determinations, and interpretations . . . respecting applicable water quality

standards and compliance with these standards in particular circumstances".[6]

The Executive Order No. 11574 program, with certain changes, was incorporated into § 401 of Public Law 92-500. *United States v. Pennsylvania Chem. Corp., supra.* Under §§ 402(a)(4) and 402(a)(5), all discharge permits issued or pending under Section 13 were deemed issued under § 402 and no new permits under Section 13 were to be issued.

In view of the transition of the discharge permit program directly from the Secretary of the Army to the Administrator of EPA, the authority both shared regarding applicable water quality standards and issuance of permits, and the more stringent limitation requirement of Section 301(b)(1)(C), it is obvious that the majority erred in holding Public Law 89-298 inapplicable to EPA or to permits issued under FWPCA. (App. p. 14)

II.

THE ERROR OF THE COURT BELOW WHICH RELIEVES THE ADMINISTRATOR OF STRICT COMPLIANCE WITH SECTION 301(b)(1)(C) IS A SOURCE OF ONGOING HARM TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM.

The Administrator is required under Section 301 FWPCA to establish 1977 and 1983 effluent limitations based primarily on classes and categories of point sources. *E. I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 51 L.Ed. 2d 204, 97 S.Ct. 965 (1977). He is also required under Section 301(b)(1)(C) to condition the NPDES permit upon the discharger's meeting "all applicable requirements under Sections 301", et al. and

[6] EPA had been created by Reorganization Plan No. 3 which became effective December 2, 1970. 35 Fed. Reg. 15623 (1970).

"any more stringent limitation . . . established pursuant to any State law or regulations . . . or other Federal law or regulation . . .". The Administrator is given no authority to set aside or modify such limitations in a permit proceeding. *United States Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977).

The error of the court below relieves the Administrator of strict compliance with Section 301(b)(1)(C) by the simple expedient of not making a determination of a "more stringent limitation" established pursuant to a State or Federal law or regulation. This, we submit, is a source of ongoing harm to the NPDES program and frustration of the Congressional policies set forth in the Act.

CONCLUSION

In view of the ongoing harm to the National Pollutant Discharge Elimination System resulting from the error of the court below, it is submitted that Certiorari should be granted, the decision of the court below reversed, and the cause remanded for such further proceedings as may be appropriate.

Respectfully submitted,

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APPENDIX OF STATUTES, REGULATIONS, AND EXECUTIVE ORDERS

FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED (33 U.S.C. §§ 1251 et seq.)

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

* * * * *

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314 (d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Adninistrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of polutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste

(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters. June 30, 1948, c. 758, Title III, § 301, as added Oct. 18, 1972, Publ.L. 92-500, § 2, 86 Stat. 844.

* * * * *

§ 1342. National pollutant discharge elimination system—Permits for discharge of pollutants

(a)(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator

determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from

any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

* * * * *

§ 1369. Administrative procedure and judicial review

* * * * *

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(B)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

PUBLIC WORKS—RIVERS AND HARBORS

PUBLIC LAW 89-298; 79 STAT. 1073

[S. 2300]

An Act authorizing the construction, repair, and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

* * * * *

TITLE III—RIVERS AND HARBORS

Sec. 301. The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. The provisions of section 1 of the River and Harbor Act approved March 2, 1945 (Public Law Numbered 14, Seventy-ninth Congress, first session), shall govern with respect to projects authorized in this title; and the procedures therein set forth with respect to plans, proposals, or reports for works of improvement for navigation or flood control and for irrigation and purposes incidental thereto, shall apply as if herein set forth in full.

NAVIGATION

* * * * *

Burns Waterway Harbor, Indiana: House Document Numbered 160, Eighty-eighth Congress, at an estimated cost of $25,000,000. The Secretary of the Army may reimburse the State of Indiana for the expenditure of funds used to construct such portions of the project as approved by the Chief of Engineers and constructed under the supervision of the Chief of Engineers. Unless construction of the project is initiated within three years

from the date of enactment of this Act, the authority to reimburse the State of Indiana contained in this paragraph shall expire. The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. No appropriation is authorized to be made for the construction of this project until the Indiana Dunes National Lakeshore has been voted upon by both Houses of Congress during the same Congress.
(Reprinted in U.S. Code Cong. and Admin. News, 1965, Vol. 1, 1074, 1093-95)

THE REFUSE ACT

(33 U.S.C. § 407)

§ 407. Deposit of refuse in navigable waters generally

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, or from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided*, That nothing herein contained shall extend to, apply to, or prohibit the operations in connection with the improvement of navigable waters or con-

struction of public works, considered necessary and proper by the United States officers supervising such improvement or public work: *And provided further*, That the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful.
Mar. 3, 1899, c. 425, § 13, 30 Stat. 1152.

EXECUTIVE ORDER No. 11574

December 25, 1970, 35 F.R. 19627

ADMINISTRATION OF REFUSE ACT PERMIT PROGRAM

By virtue of the authority vested in me as President of the United States, and in furtherance of the purposes and policies of section 13 of the Act of March 3, 1899, c. 425, 30 Stat. 1152 (33 U.S.C. 407), the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 et seq.), the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661-666c), and the National Environmental Policy Act of 1969 (42 U.S.C. 4321--4347), it is hereby ordered as follows:

Section 1. Refuse Act permit program. The executive branch of the Federal Government shall implement a permit program under the aforesaid section 13 of the Act of March 3, 1899 (hereinafter referred to as "the Act") to regulate the discharge of pollutants and other refuse matter into the navigable waters of the United States or their tributaries and the placing of such matter upon their banks.

Sec. 2. Responsibilities of Federal agencies. (a)(1) The Secretary shall, after consultation with the Administrator respecting water quality matters, issue and amend, as appropriate, regulations,

procedures, and instructions for receiving, processing, and evaluating applications for permits pursuant to the authority of the Act.

(2) The Secretary shall be responsible for granting, denying, conditioning, revoking, or suspending Refuse Act permits. In so doing:

(A) He shall accept findings, determinations, and interpretations which the Administrator shall make respecting applicable water quality standards and compliance with those standards in particular circumstances, including findings, determinations, and interpretations arising from the Administrator's review of State or interstate agency water quality certifications under section 21(b) of the Federal Water Pollution Control Act (84 Stat. 108). A permit shall be denied where the certification prescribed by section 21(b) of the Federal Water Pollution Control Act has been denied, or where issuance would be inconsistent with any finding, determination, or interpretation of the Administrator pertaining to applicable water quality standards and considerations.

(B) In addition, he shall consider factors, other than water quality, which are prescribed by or may be lawfully considered under the Act or other pertinent laws.

(3) The Secretary shall consult with the Secretary of the Interior, with the Secretary of Commerce, with the Administrator, and with the head of the agency exercising administration over the wildlife resources of any affected State, regarding effects on fish and wildlife which are not reflected in water quality considerations, where the discharge for which a permit is sought impounds, diverts, deepends the channel, or otherwise controls or similarly modifies the stream or body of water into which the discharge is made.

(4) Where appropriate for a particular permit application, the Secretary shall perform such consultations respecting environmental amenities and values, other than those specifically referred to in paragraphs (2) and (3) above, as may be required by the National Environmental Policy Act of 1969.

(b) The Attorney General shall conduct the legal proceedings necessary to enforce the act and permits issued pursuant to it.

Sec. 3. Coordination by Council on Environmental Quality. (a) The Council on Environmental Quality shall coordinate the regulations, policies, and procedures of Federal agencies with respect to the Refuse Act permit program.

(b) The Council on Environmental Quality, after consultation with the Secretary, the Administrator, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Agriculture, and the Attorney General, shall from time to time or as directed by the President advise the President respecting the implementation of the Refuse Act permit program, including recommendations regarding any measures which should be taken to improve its administration.

Sec. 4. Definitions. As used in this order, the word "Secretary" means the Secretary of the Army, and the word "Administrator" means the Administrator of the Environmental Protection Agency.

RICHARD NIXON.

THE WHITE HOUSE,
December 23, 1970.

[*Reprinted in U.S. Code Cong. and Admin. News, 1970, Vol. 3, 6305*]

RULES AND REGULATIONS OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY

(40 C.F.R. § 125.36(m)

(m) Decision of the Assistant Administrator for Enforcement and General Counsel on questions of law.

(1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided in accordance with this subsection and shall not be considered at the adjudicatory hearing.

(2) The Presiding Officer shall determine which issues, if any, submitted by the parties fall into the category specified in subparagraph (1) of this paragraph, and shall refer such issues to the Assistant Administrator for Enforcement and General Counsel for resolution. Such referral may be accompanied by briefs, filed with the Assistant Administrator for Enforcement and General Counsel within twenty (20) days of the removal of the referred issues from the adjudicatory hearing by the Presiding Officer pursuant to subparagraph (2) of this paragraph. . . . .

* * * * *

(4) The Assistant Administrator for Enforcement and General Counsel shall provide the Regional Administrator, the Presiding Officer, where appropriate, and each party with a written decision with respect to each referred issue of law. A written opinion setting forth the reasons and basis for the decision shall also be provided. The decision of the Assistant Administrator for Enforcement and General Counsel shall be final with respect to each referred issue of law as it relates to the particular permit in question and shall be relied upon by the Regional Administrator in rendering the initial decision.

Supreme Court, U. S.
FILED
JUN 19 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1798

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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In The

Supreme Court of the United States

October Term, 1978

No. 78-

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-2098, 77-1262

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Intervenor.

On Petition For Review

ARGUED OCTOBER 27, 1977—DECIDED JANUARY 30, 1978

Before FAIRCHILD, *Chief Judge,* COWEN,* *Senior Judge,* and CUMMINGS, *Circuit Judge.*

COWEN, *Senior Judge.* This case involves the interpretation of Public Law 89-298[1] as it applies to the control of pollutants from the Northern Indiana Public Ser-

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* Senior Judge Wilson Cowen of the United States Court of Claims is sitting by designation.

[1] Act of October 27, 1965, title III, § 301, 79 Stat. 1073.

vice Company (NIPSCO) generating plant into Lake Michigan at Burns Waterway Harbor adjacent to the Indiana Dunes National Lakeshore. The question is whether the Environmental Protection Agency's (EPA) grant of a seemingly lawful discharge permit to NIPSCO under section 402 of the Federal Water Pollution Control Act of 1972, as amended, (FWPCA)[2] was nonetheless unlawful, because EPA ignored a higher standard established for pollution control in the vicinity of Burns Harbor under Public Law 89-298. Petitioners, the Izaak Walton League, et al., (League) contend that they have properly exhausted their administrative remedies before EPA; that this court has jurisdiction over this action, and that the EPA Administrator's decision interpreting Public Law 89-298, should be reversed. We hold that the action is properly before this court, but that the legislative history and a fair interpretation of the statute warrant affirmance of the Administrator's decision on the merits.

Background

On October 31, 1974, the Director of the Enforcement Division of Region V of EPA, pursuant to section 402 of the FWPCA,[3] issued a National Pollutant Discharge Elimination System (NPDES) permit to NIPSCO for its coal-fired Bailly generating station adjacent to Burns Harbor. This permit required NIPSCO to heed certain

[2] 86 Stat. 816 (codified at 33 U.S.C. §§ 1251 *et seq.* (Supp V 1975)).

[3] 33 U.S.C. § 1342 (Supp. V 1975). Section 1342(a)(1) provides:

> "Except as provided in sections 1328 and 1344 of this title, the Administrator [of EPA] may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) [which makes pollution unlawful except as in compliance with law] of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter."

effluent limitations[4] and other special conditions. On November 14, 1974, NIPSCO requested an adjudicatory hearing[5] to resolve questions on the permit. EPA granted this request and gave public notice of the hearing on June 27, 1975. In response to this notice, the petitioners filed a request for party status on July 28, 1975. EPA granted this request on August 29, 1975.

As a result of a prehearing conference held on November 12, 1975, the presiding officer certified to the General Counsel of EPA for decision what has become the major issue in this litigation. Petitioners contended that Public Law 89-298 should have been applied by EPA's Regional Director of Enforcement in issuing NIPSCO a permit to discharge pollutants into Burns Harbor under the FWPCA. Specifically, the petitioners contended the following provision in Public Law 89-298 mandates a higher standard than does section 402 of the FWPCA and that EPA should have followed this higher standard in issuing the permit to NIPSCO.

> [Prior to the construction of the Harbor project the] State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the *maximum extent feasible* in order to minimize any adverse effects on public recreational areas in the general vicinity of [Burns] Harbor (emphasis added).[6]

[4] The Federal Water Pollution Control Act, § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (Supp. V 1975), provides:

> "In order to carry out the objective of this chapter there shall be achieved—
>
> "(1)(A) not later than July 1, 1977, *effluent limitations* for point sources * * * which shall require the application of the *best practicable control technology currently available* as defined by the Administrator * * *." (emphasis added).

[5] *See* note 3 *supra* (the provision that a permit may be granted after a public hearing.)

[6] Act of October 27, 1965, title III § 301, 79 Stat. 1073.

On June 9, 1976, the General Counsel of EPA decided:

> Congress clearly left the determination of the scope of such assurance [about control of pollution near Burns Harbor] to the discretion of the Secretary of the Army. * * *
>
> * * * The Act on its face does not impose any obligations on parties other than those named in it. [EPA was not named]. In the absence of compelling legislative history to the contrary, I conclude that Public Law 89-298 has no applicability in establishing effluent limitations for the NPDES permit at issue.[7]

On July 6, 1976, the petitioners filed a petition to the Administrator for review of this decision. He first considered the "ripeness" of the petition for review and decided that, since the decision of the General Counsel would "undergo no further refinements" prior to the deicsion of the Regional Administrator about the NPDES permit, he would exercise his "inherent discretion to entertain the instant Petition."[8] He then denied the petition on the merits on August 10, 1976.

On October 7, 1976, the Regional Administrator issued the initial decision authorizing the issuance of an amended NPDES permit to NIPSCO. At this time the parties entered into a stipulation which resolved factual issues and preserved legal questions pertaining to Public Law 89-298. When the petitioners did not seek any further review with the Administrator within 10 days,

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[7] Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. section 125.36(m), No. 42, at 4 (1976), (Respondent's Appendix at p. 422).

[8] *In re* National Pollution Discharge Elimination System Permit For: Northern Indiana Public Service Co. Bailly Generating Station NPDES No. IN 0000132, NPDES Appeal No. 76-4, at 2-3 (August 10, 1976).

the initial decision of the Regional Administrator on the permit became the final decision of the Agency.[9]

On November 8, 1976, the petitioners filed their first appeal (No. 76-2098) with this court seeking judicial review of the Administrator's decision of August 10, 1976, with respect to Public Law 89-298. On December 7, 1976, the Director of Enforcement of Region V formally issued the NPDES permit to NIPSCO. On March 7, 1977, the petitioners filed their second appeal to this court (No. 77-1262), seeking judicial review of the order of December 7, 1976, issuing the permit. In particular, the appeal challenges the Administrator's decision of August 10, 1976, with respect to Public Law 89-298. By order of May 9, 1977, and by amendment of May 16, 1977, this court ordered the consolidation of the two appeals (Nos. 76-2098 and 77-1262).

The Jurisdictional Issues

The intervenor in these appeals, NIPSCO, contends that the petitioners are not properly before this court, because they did not exhaust their administrative remedies prior to filing either of the appeals. EPA also contends that appeal No. 76-2098 was premature. We need not pass on that question in view of our holding that the petitioners sufficiently exhausted their administrative remedies in appeal No. 77-1262.

---

[9] 40 C.F.R. § 125.36(*l*)(4) reads in pertinent part:

> "The initial decision of the Regional Administrator shall become the final decision of the Agency unless within ten (10) days after its issuance any party shall have appealed the initial decision to the Administrator pursuant to paragraph (n)(1) of this section * * *."

40 C.F.R. § 125.36(n)(3) reads in pertinent part:

> "Any person seeking review of the initial decision of the Regional Administrator by the Administrator shall, within ten (10) days of the initial decision of the Regional Administrator file with the Administrator and mail, by certified mail, to all parties a petition for the Administrator's review. * * *"

With respect to appeal No. 77-1262, NIPSCO first invokes 40 C.F.R. § 125.36(*l*)(4)[10] as providing that the October 7, 1976, initial decision of the Regional Administrator issuing the permit to NIPSCO, became the final decision of the Agency when an appeal was not taken to the Administrator following this decision. This is a correct reading of the EPA regulations. NIPSCO then argues that such an appeal was a "prerequisite to judicial review," and since petitioners did not pursue that avenue prior to appealing to this court on March 7, 1977, they have failed to exhaust their administrative remedies. NIPSCO asserts that they have not provided the Agency with an opportunity to correct its errors and to moot judicial controversy, and also that a court of appeals is entitled to the full benefit of the expertise of an administrative agency and of a complete record.

NIPSCO has provided this court an accurate reflection of axioms requiring exhaustion of administrative remedies. Nevertheless, NIPSCO has ignored the very axiom which is decisive with respect to the matter at hand. A remedy need not be exhausted if to do so would be a futile gesture. *City Farmers Trust Co. v. Schnader*, 291 U.S. 24, 34 (1934); *Montana Nat'l Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928); Davis, ADMINISTRATIVE LAW TREATISE, § 20.07, at 99 (1958). This is the case here.

The EPA regulations cited by NIPSCO do contemplate that prior to judicial review of a permit, the Administrator must have an opportunity to review the contested issues concerning the permit.[11] Furthermore, the Administrator, in his August 10, 1976, decision following the petitioners' original appeal to him of the General Counsel's decision relative to Public Law 89-298, has recognized that normally an appeal of the

[10] *Id.*

[11] 40 C.F.R. § 125.36(n)(6) provides:

> "A petition to the Administrator for review of any initial decision of the Regional Administrator pursuant to paragraph (n)(1) of this section is, pursuant to 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final decision of the Administrator."

General Counsel's decision should not be filed until the Regional Administrator has issued an initial decision on the permit.[12] Nevertheless, this case does not involve the usual situation. The Administrator, also in his August 10, 1976 decision, found that the same EPA regulations which contemplate review after the initial decision on the permit leave some room for interpretation.[13] Further, he decided that since the decision of the General Counsel regarding Public Law 89-298 could "undergo no further refinements prior to the initial decision" on the permit, he would exercise his "inherent discretion" to entertain the petition early.[14] Thus he was given, and he accepted, the opportunity to rule definitively on the sole substantive issue on appeal before this court. The respondent Agency does not now seek further opportunity for review, but instead joins the petitioners' contention that administrative remedies have been properly exhausted. In this context, a second administrative review on the applicability of Public Law 89-298 to the permit would serve no useful purpose.[15]

[12] *In re* National Pollution Discharge Elimination System Permit For: Northern Indiana Public Service Co. Bailly Generating Station NPDES No. IN 0000132, NPDES Appeal No. 76-4, at 3 (August 10, 1976).

[13] *Id.*

[14] *Id.*

[15] The petitioners raise a further argument. They did not receive a letter notifying them of the October 7, 1976, initial decision of the Regional Administrator on the permit until October 26, 1976. The Acting Regional Hearing Clerk granted them a 10-day extension of time to file an appeal to the Administrator. This raises the question whether the 10-day time limit for appeal expired on October 18, 1976, or November 5, 1976, or whether, as petitioners contend here, the extension of time for appeal was contrary to other Agency regulations so that on the whole, the Agency made it effectively impossible for the petitioners to comply with the 10-day time limit. We need not resolve this dispute at this time because our decision that further exhaustion of administrative remedies would have been futile in No. 77-1262 moots this dispute over impossibility of exhaustion of remedies.

NIPSCO also argues that the petitioners' application for judicial review of the permit in No. 77-1262 has not been filed in a timely and proper manner pursuant to the FWPCA. The Act reads in pertinent part:

> (b)(1) Review of the Administrator's action * * * (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals * * *. *Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial* * * *. (emphasis added).[16]

In appeal No. 77-1262, the Regional Director of Enforcement formally issued the permit to NIPSCO on December 7, 1976, and the petitioners filed this appeal on March 7, 1977, within 90 days of the issuance of the permit. However, NIPSCO contends that December 7 represents a date of "clerical import only." It argues that the "significant date for purposes of filing a petition for review" is November 5, 1976, the date NIPSCO alleges the initial decision of the Regional Administrator "authorizing the issuance of the permit became the final determination of the Agency." This argument is specious. The statute clearly allows an appeal within 90 days of the date of *issue* of a permit, and this 90-day time limit was complied with by petitioners when they filed on March 7, 1977.

Therefore, NIPSCO's contention that the petition for review should be dismissed because this court lacks jurisdiction, is rejected.

Applicability of Public Law 89-298

We now turn to the merits. For a number of years prior to 1965, industrialists and conservationists waged a battle over the use of the shoreline of Lake Michigan near Burns Ditch, Indiana. Industrialists proposed to develop the area as Burns Waterway Harbor. Conservationists sought to expand an existing Indiana State park and include the area in a proposed Indiana Dunes

[16] 33 U.S.C. § 1369(b)(1)(F) (Supp. V 1975).

National Lakeshore Park. Between 1963 and 1965, both sides in this "port versus park" controversy compromised and agreed to the development of a public harbor and a national lakeshore. Legislation to this effect was introduced in both houses of Congress in 1965.

The Public Works and Interior Committees of each house held hearings and marked up legislation creating the port and park respectively. The Public Works Committees acted first. In letters and testimony recorded in the House and Senate, considerable support was expressed for pollution controls on industry in the Burns Waterway area. The Bureau of the Budget and the Secretary of the Army both recommended that the State of Indiana furnish assurances satisfactory to the Secretary of the Army that "water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the harbor."[17] The Department of Health, Education, and Welfare; the Department of Interior, and various senators, representatives, and conservation groups all voiced their common concern that pollution in the vicinity of the proposed harbor be controlled.

The Public Works Committee of each house reported out a bill authorizing the development of Burns Waterway Harbor.[18] Although these bills did not contain specific language providing for control of pollution in Burns Harbor, they did authorize the development of the harbor under the "direction of the Secretary of the Army" pursuant to House Document 160.[19] This document contained the recommendation of the Secretary of the Army that:

[17] Letter of Elmer B. Staats, Deputy Director, Bureau of the Budget, to Cyrus R. Vance, Secretary of the Army (September 24, 1963) (Resp. App. p. 7); letter of Cyrus R. Vance to John W. McCormack, Speaker of the House (September 24, 1963) (Resp. App. p. 13).

[18] *See* S. Rep. No. 464, 89th Cong., 1st Sess. (July 19, 1965); H.R. Rep. No. 973, 89th Cong., 1st Sess. (September 9, 1965).

[19] 88th Cong., 1st Sess. (1963) (Resp. App. p. 7).

> * * * the State of Indiana furnish assurances satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the harbor.

Both committee reports indicated that they had no objection to this provision.[20] After passage of each bill by the respective houses, the conferees from each house wrote this exact language into the bill, and the legislation was enacted.[21]

Despite this rather clear directive that the Secretary of the Army should be furnished assurances regarding control of pollution, Congress did not prescribe a specific water quality standard, treatment standards, schedules of compliance, or the like, to which industry in Burns Harbor need adhere. Moreover, Congress did not confer authority in the Secretary to promulgate such specific standards. Rather, the Secretary was directed to satisfy himself that Indiana would have some methods, presumably some state standards, which would provide maximum feasible protection from pollution in the vicinity of the harbor.

In the House and Senate hearings, there was very little discussion concerning specific measures or precise means to control pollution. Perhaps the most explicit plea for specific standards was made in the House hearings by Sam Ropchan, President of the Fort Wayne Chapter of the Izaak Walton League. He said:

> * * * we ask that you call for provisos specifying conformity to *rigid pollution standards.* At present there are only vague references to pollution in House Document 160. [The document which contained the pollution control recommendation of the Secretary of the Army.] We feel the public is

[20] S. Rep. No. 464, 89th Cong., 1st Sess., at 23 (July 19, 1965); H.R. Rep. No. 973, 89th Cong., 1st Sess., at 161 (September 9, 1965).

[21] Act of October 27, 1965, title III, § 301, 79 Stat. 1073.

> entitled to *better defined assurances* that the irreplaceable natural qualities in the dunes will be protected. (emphasis added).[22]

Showing little response, the committee members did not even inquire of Mr. Ropchan what rigid standards or better defined assurances he wished to see enacted into law. Obviously, the Congress rejected his plea, because it enacted into law word-for-word the so-called "vague references" to pollution contained in House Document 160.

Nor did members of Congress indicate at any point in the hearings or in floor debate that they meant the pollution control provision in Public Law 89-298 to be a precise standard. Not one of the specific references to the hearings cited in the reply brief of petitioners supports the proposition that members of Congress intended the pollution control provision to be a precise standard. Rather, the cited materials support the proposition that this provision was only meant to confer upon the Secretary of the Army the authority to require assurances from the State of Indiana that pollution would be controlled to the maximum extent feasible.[23]

[22] *Hearings Before the Subcommittee on Rivers and Harbors and the Subcommittee on Flood Control of the Committee on Public Works House of Representatives*, 89th Cong., 1st Sess. 655 (1965) [hereinafter cited as *House Hearings.*] (Respondent's Appendix p. 235). Roy B. Crockett and Thomas E. Dustin of the Indiana Division of the Izaak Walton League made a similar written plea for "rigid Federal control standards." *Id.* at 656. (Resp. App. p. 236).

There were very few, if any, other pleas or comments concerning explicit federal control measures. There were some complaints about the inadequacy of Indiana standards. *See* the statement of petitioner Herbert Read, Chairman, Engineering Committee, Save the Dunes Council, Inc., *Hearings Before the Subcommittee on Flood Control—Rivers and Harbors of the Committee on Public Works United States Senate*, 89th Cong., 1st Sess., 374 (1965) [hereinafter cited as *Senate Hearings*].

[23] *See, e.g., House Hearings, supra* note 22, at 653-54, 660, (Respondent's Appendix 233-34, 240); *Senate Hearings, supra* note 22, at 349, 372, 389, 393-94, (Resp. App. at 107, 130, 147, 151-52).

Remarks by Senator Bayh during the Senate Hearings provide some insight into the Congressional intent to leave the matter of pollution control assurances to the discretion of the Secretary of the Army, and thus to some extent to the Corps of Engineers. He explained that the Corps of Engineers could ask the State of Indiana to meet certain criteria before the Secretary might be willing to certify that he had received proper assurances about pollution control. But the senator argued that specifics ought not be included in the Federal legislation authorizing the harbor. He continued:

> This is the way it is done. I have no doubt this is the way it will be done. * * * I ask you to recognize if you can that although you might feel a little bit better if this is all in black and white now, that indeed developments may point out as we look into the design of the port that the original plan for pollution control would not be as good as the ones which might be tailormade to meet the final plan of design.[24]

There is significance in the fact that Public Law 89-298 does not contain a specific standard and does not give the Secretary of the Army authority to promulgate precise standards. It lies in the fact that pollution control under a FWPCA permit for discharge of pollutants must not only require the application of the "best practicable control technology currently available,"[25] but must also meet "any more stringent" standard established pursuant to any other Federal law or regulation[26] If Public Law 89-298 had provided a

[24] *Senate Hearings, supra* note 22, at 383, (Resp. App. at 141).

[25] FWPCA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (Supp. V 1975).

[26] *Id.* § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) provides:

> "In order to carry out the objective of this chapter there shall be achieved—* * *

(Footnote continued on following page)

precise standard and one more stringent than that required by FWPCA § 301(b)(1)(A), the court would have to direct the Regional Administrator of EPA to heed that stricter standard in the issuance of the permit to NIPSCO. But the public law does not articulate any specific standard. The Act voices only a broadly stated objective, which gives the Secretary of the Army authority to exercise his discretion in obtaining assurances from Indiana of "maximum feasible" pollution control in Burns Harbor.

Furthermore, it appears that the Secretary of the Army has already received the required assurances. Public Law 89-298 appropriated $25 million for construction of Burns Waterway Harbor. It was expressly stipulated in the Act that the State of Indiana should be reimbursed for its expenditure of funds in the construction of the harbor. But the reimbursement was to be made only if the construction was approved and

[26] *continued*

> "(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations * * * or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter."

The committee report on this provision explains it in the following manner:

> "Section 301(b)(1)(C) provides adequate authority to apply new information to existing water quality requirements and upgrade effluent limits accordingly.
>
> "In other words, wherever the Administrator determines that application of the best practicable treatment requirements of Phase I will not provide for implementation of *existing water quality standards* for interstate or intrastate streams, he must tighten the requirements against a source of discharge or group of sources." (emphasis added).

Senate Public Works Committee, Federal Water Pollution Control Act Amendments of 1977, S. Rep. No. 92-174, 92d Cong., 1st Sess., (October 28, 1971), *reprinted in* [1972] *U.S. Code Cong. and Adm. News* 3368, 3710 (Senate bill was passed in lieu of House bill).

supervised by the Chief of the Corps of Engineers.[27] Since the record reveals that the state has received this reimbursement, it seems apparent that the Secretary, through the Corps of Engineers, has already been given assurances, satisfactory to him, that the state will control pollution in the harbor to the maximum extent feasible. We think the Secretary's acceptance of Indiana's submission is the end of the matter as regards the applicability of Public Law 89-298.[28] Beyond that, the public law has no application to EPA or to permits issued under the FWPCA.

[27] Act of October 27, 1965, title III, § 301, 79 Stat. 1073.

[28] The hearing record further supports our contention that all Congress intended in its Public Law 89-298 proviso was for the Secretary of the Army to satisfy himself prior to construction of the harbor that pollution would be controlled to the "maximum extent feasible." Witness the following exchange between Senator Birch Bayh of Indiana and Colonel Pinnell of the Corps of Engineers:

> "Senator Bayh. I am curious as to what specific action has to be taken by the State or by the port commission to provide these assurances to the Secretary. At what time can we get an unqualified statement saying that Bethlehem is sufficiently far along, or Midwest is sufficiently far along—pollution plans have been made? Do we need to get these assurances at this particular time, or is this part of the negotiation that goes on between the corps and the State?
>
> "Colonel Pinnell. As a normal matter, sir, and in this case as well, *these assurances are required prior to initiation of construction.* In the instant case the assurances are not required now at this stage although we do have informal assurances.
>
> "Nor would they be required prior to the first appropriation of funds for the project, since the first appropriation of funds is for preconstruction planning purposes. However, *prior to the initiation of construction, the requirements must be met.*
>
> "Senator Bayh. So then this is really a final check that the corps has and the Secretary of the Army has to see that all the necessary prerequisites are present?
>
> "Colonel Pinnell. That is correct." (emphasis added).

Senate Hearings, supra note 22, at 345 (Resp. App. at 103).

Despite the fact that Public Law 89-298 is a directive to the Secretary of the Army, petitioners contend that the "policy underlying the legislation" is a mandate to the Administrator of EPA. Therefore, they say the law demands that EPA promulgate, or require the State of Indiana to promulgate, stricter standards than are provided by section 301(b)(1)(A) of the FWPCA, and that these stricter standards must be applied in permits issued under the FWPCA. This court is aware of the impact of underlying Congressional policy on legislative interpretation. In *United States v. Sisson*, 399 U.S. 267, 297-98 (1970), the Supreme Court stated:

> * * *The axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed.* * *

This guidance, however, does not preclude the long held rule that, in construing statutes, courts must look first to the text of the statute itself. *E.g., United States v. Bass*, 404 U.S. 336, 339 (1971). In the case at hand, the face of Public Law 89-298 is very clear. It gave a directive to the Secretary of the Army, not to the Administrator of EPA. The Act left the matter to the Secretary's discretion; it did not authorize him, and certainly not the Administrator, to promulgate standards. He was to receive assurances of pollution control prior to the construction of the harbor and that was to be the end of the matter. He was not authorized to demand assurances indefinitely. In our opinion, it would be judicial legislation to find that Congressional policy requires the EPA to act in a situation and in a manner clearly not contemplated by the language of Public Law 89-298 or its legislative history.

Petitioners also rely on a report[29] made by the Comptroller General to the Congress on September 20, 1971, about 6 years after the enactment of Public Law

[29] Comptroller General of the United States, Environmental and Economic Problems Associated With The Development Of The Burns Waterway Harbor, Indiana (September 20, 1971).

89-298. The General Accounting Office (GAO) made a study to determine if the Secretary of the Army had received the assurances required by the public law from the State of Indiana. The report stated that:

> * * *Certain weaknesses were noted in the State's implementation of its air and water pollution control program which, in GAO's opinion, raise questions regarding the adequacy of the assurances provided. The weaknesses noted resulted primarily from a lack of adequate resources and a need to strengthen the State's laws and regulations. [App. to Petitioner's Brief, pp. 66-67].

It is not clear what petitioners expect to establish by the GAO report. It does not purport to interpret the intention of Congress on the issue before us and it does not say that Public Law 89-298 imposed any duty on the Administrator. In fact, the report clearly recognizes that the Secretary of the Army, rather than the Administrator, had the responsibility for evaluating the assurances of the State of Indiana. At most, the GAO report reflects a difference of opinion between the GAO and the Secretary of the Army regarding the assurances by the State of Indiana; in that connection, the GAO report states:

> The Department of the Army did not agree that the required assurances had not been obtained and stated that the assurances had been interpreted to mean the State's ability and intent to provide the landward facilities on a schedule that would meet the need for the developing traffic. A judgment was made by the Department that such ability and intent had been demonstrated. [App. to Pet. Brief, p. 68].

In our opinion, the GAO report does not support petitioners' interpretation of Public Law 89-298.

If we assume arguendo that Public Law 89-298 required the EPA to apply that law in the issuance of the permit in issue, our holding would be the same. Petitioners have made no showing that any requirements based on the public law would be more stringent

than the "best practicable control technology currently available," the standard set out in FWPCA § 301(b)(1)-(A). In oral argument, the petitioners stated that the control standard they would like to see applied to the NIPSCO permit is the "best available technology economically achievable"; this is the standard provided in the FWPCA as one to be met no later than July 1, 1983.[30] Petitioners argue that application of this standard is what the "maximum extent feasible" language of Public Law 89-298 requires. The legislative history of the FWPCA, however, persuades us to reject petitioners' contention. The Senate committee report on the FWPCA Amendments of 1972 explains that the FWPCA standards "are expected to establish the *maximum level of pollution allowable* in interstate waters." (emphasis added).[31] Obviously, in this case, this means that until some future time not later than July 1, 1983, the maximum level of pollution allowable in Burns Harbor is that level which cannot be prevented by the "best practicable control technology currently available." This is the standard applied by EPA in the issue of the NIPSCO discharge permit in question. We do not perceive that any difference in pollution control would

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[30] The statute provides:

> "In order to carry out the objective of this chapter there shall be achieved—* * *
>
> "(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources * * * which (i) shall require application of the best available technology economically achievable for such category or class * * *."

FWPCA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A) (Supp. V 1975).

[31] The report reads:

> "The setting of water quality standards for interstate navigable waters, as indicated above, is the keystone of the present program for control of water pollution. The standards are intended to function * * *
>
> "(1) As a measure of performance * * * to establish the maximum level of pollution allowable in interstate waters."

Senate Public Works Committee, Federal Water Pollution Control Act Amendments of 1972, S. Rep. No. 92-414, 92d Cong., 1st Sess. (Oct. 28, 1971), *reprinted in* [1972] *U.S. Code Cong. & Adm. News*, 3368, 3671. (Senate bill passed in lieu of House bill).

result from enforcement of an objective to control pollution to the "maximum extent feasible" on one hand and a standard which establishes the "maximum level of pollution allowable" on the other. Thus, application of the objective stated in Public Law 89-298 would not result in the adoption of a standard more stringent than the applicable standards under the FWPCA.

Our conclusion on this point is buttressed by the legislative history of Public Law 89-298. Petitioners contend that the history "makes repeated reference to the necessity for *extraordinary* pollution control * * *." (emphasis added). This is hardly the case. Of all the witnesses at the hearings, only Sam Ropchan, Roy B. Crockett, and Thomas E. Dustin of the Izaak Walton League asked the Congress to adopt "rigid" control standards.[32] Mr. Ropchan complained that the "maximum extent feasible" language eventually enacted into law was not rigid enough, and he requested the Congress to spell out "better defined assurances" of pollution control.[33] None of the members of Congress voiced a complaint about the language eventually adopted. Obviously, enactment of the language criticized by Mr. Ropchan indicates Congressional disapproval of his suggestion. The Congress does not appear to have regarded Public Law 89-298 as requiring an "extraordinary" pollution control standard. Certainly, in light of the apparent intent of Congress as reflected in Public Law 89-298 and in the FWPCA Amendments of 1972, we cannot conclude that the public law warrants the application of a higher standard to the NIPSCO permit in issue than the one which EPA has applied.

Conclusion

For all of the reasons set out above, the petition of the League is dismissed and the decision of the Administrator on Public Law 89-298 is affirmed.

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[32] *House Hearings, supra* note 22, at 655-56, Resp. App. at 235-36.

[33] Id. at 655, Resp. App. at 235.

FAIRCHILD, *Chief Judge* (dissenting in part). Although I agree with the treatment of the jurisdictional issues, I respectfully dissent from the majority opinion for the following reasons.

At issue in this case are two differently phrased standards for water pollution control. The first, "maximum extent feasible," was established in 1965 as part of the legislative compromise which created the Burns Harbor Waterway and the Indiana Dunes National Lakeshore. The second, "effluent limitations reflecting application of best practicable technology," was articulated in the 1972 Federal Water Pollution Control Act as binding on the EPA's permit decision-making. It is unclear from the record, briefs and oral argument whether these two phrases in fact establish two distinct standards, one higher than the other, or are merely a restatement of the same idea.

The record shows that the EPA deemed the 1965 language inapplicable and therefore never determined its meaning. In response to Porter County Isaak Walton League's challenge to the issuance of a NPDES permit to NIPSCO, the General Counsel of the EPA decided that "the [1965] Act on its face does not impose any obligations on parties other than those named in it." Thus, because Congress left the question of the sufficiency of the water pollution control assured by the state to the Secretary of the Army and because the EPA was not in existence at the time, the General Counsel concluded that "Public Law 89-298 has no applicability in establishing effluent limitations of the NPDES permit at issue." In its brief the EPA argues and the majority adopts the view that because the 1965 language is ambiguous it is not really a standard capable of enforcement. Furthermore, the EPA asserts and the majority also adopts the view that even if PL 89-298 presents a more stringent standard than that articulated in FWPCA, responsibility for implementing such standard was left solely to the discretion of the Secretary of the Army and that duty has since been fulfilled.

Section 301(b)(1)(C), however, requires the EPA Administrator to effectuate more stringent standards

for pollution control where created by federal or state statute, not just the "best practicable technology," in the granting of section 402 permits. In this case, I cannot see how the EPA can fulfill its duty to implement "more stringent requirements" if the agency does not make a determination what constitutes "maximum feasible control" and expressly states that condition.

"If an order is valid only as a determination of a policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. . . . [A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1942).

If there is a difference between the two standards, and if, as petitioners argue, the 1965 is higher, the 1965 standard should control the EPA's permit issuance with regard to Burns Harbor. I would set aside the EPA's decision and remand for determination whether the effluent limitations prescribed in the permit fulfill the 1965 language and, if not, for imposition of limitations which would.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

MARCH 20, 1978

BEFORE

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. WILSON COWEN, *Senior Judge**
Hon. WALTER J. CUMMINGS, *Circuit Judge*

Nos. 76-2098 & 77-1262

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMMS and HERBERT P. READ,

Petitioners,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

NORTHERN INDIANA PUBLIC SERVICE COMPANY,

Intervenor.

On Petition for Review

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the petitioners, a majority of the original panel** having voted to deny a rehearing, accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Senior Judge Wilson Cowen of the United States Court of Claims is sitting by designation.

** Chief Judge Thomas E. Fairchild voted to grant petition for rehearing.

United States
Environmental Protection Agency
Washington, D.C. 20460

DECISION OF THE
GENERAL COUNSEL ON MATTERS OF LAW
PURSUANT TO 40 C.F.R. Section 125.36(m)

No. 42

In the matter of National Pollutant Discharge Elimination System permit for Northern Indiana Public Service Company, Bailly Generating Station (IN-0000132), the Presiding Officer has certified two issues of law to the General Counsel for decision pursuant to 40 C.F.R. § 125.36(m). The parties, having had the opportunity to provide written briefs in support of their respective positions, present the following issues:

ISSUE OF LAW NO. I

Question Presented

Both the permit applicant in this proceeding and the Porter County Chapter of Isaac Walton League of America, Inc., have stated the question as follows: "Whether the Permittee should be required to comply with the requirements of Public Law 89-298, Title III—Rivers and Harbors, Section 301, Navigation, paragraph captioned Burns Waterway Harbor, Indiana?"[1]

[1] EPA Region V has restated the issue in its brief to read: "Does Section 301 of the Rivers and Harbors Act, P.L. 89-298 have any applicability in setting effluent limitations for a NPDES permit?"

Conclusion

No.

Discussion

Public Law 89-298 was enacted on October 27, 1965 as an omnibus public works measure authorizing "the construction, repair and preservation of certain public works on rivers and harbors for navigation, flood control, and for other purposes." Title III of this law applies to Burns Waterway Harbor (one of several projects authorized by the law) and reads, in pertinent part, as follows:

"TITLE III—RIVERS AND HARBORS

"Sec. 301. The following works of improvement of rivers and harbors and other waterways for navigation, flood control, and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of the Army and supervision of the Chief of Engineers, in accordance with the plans and subject to the conditions recommended by the Chief of Engineers in the respective reports hereinafter designated. . . .

NAVIGATION

* * * * * * * * * *

"Burns Waterway Harbor, Indiana: House Document Numbered 160, Eighty-eighth Congress, at an estimated cost of $25,000,000. The Secretary of the Army may reimburse the State of Indiana for the expenditure of funds used to construct such portions of the project as approved by the Chief of Engineers and constructed under the supervision of the Chief of Engineers. Unless construction of the project is initiated within three years from the date of enactment of this Act, the authority to reimburse the State of Indiana contained in this paragraph shall expire. The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to

minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. No appropriation is authorized to be made for the construction of this project until the Indiana Dunes National Lakeshore has been voted upon by both Houses of Congress during the same Congress."

Public Law 89-298 establishes three preconditions to the expenditure of federal funds to reimburse the State of Indiana. There is no claim that the first of these conditions was not met—i.e., that construction be commenced within three years of enactment. And it is apparent that the third condition—relating to the Indiana Dunes National Lakeshore—has been accomplished, Congress having enacted Public Law 89-761 (16 U.S.C. §§ 460u through 4600-9) authorizing the Indiana Dunes National Lakeshore.

The Isaac Walton League contends that the second precondition, that the State of Indiana furnish assurance to the Secretary of the Army that air and water pollution would be controlled to the maximum extent feasible, imposes obligations upon the permit applicant as well.

I do not agree.

The three preconditions described above were to be met by the State of Indiana and the Congress of the United States. The condition in question requires "assurance" be furnished by the State of Indiana "satisfactory to the Secretary of the Army." Congress clearly left the determination of the scope of such assurance to the discretion of the Secretary of the Army. It appears that such assurance has been received; in any event the appropriation has been made and the harbor built.

The purposes of Public Law 89-298, insofar as it relates to the Burns Waterway Harbor, have been fully accomplished by the reimbursement of the State of Indiana with federal funds for construction of the harbor. The Act on its face does not impose any obligations on parties other than those named in it. In the absence of compelling legislative history to the contrary, I conclude that Public Law 89-298 has no applicability in establishing effluent limitations for the NPDES permit at issue.

ISSUE OF LAW NO. II

Question Presented

"Is the compliance schedule Part I.C.1.a (Page 9) a condition of the permit which is required by law, specifically Section 301(b)(1)(C) of the Federal Water Pollution Control Act (FWPCA) Amendments of 1972, to insure the attainment of State water quality standards by July 1, 1977?"

Conclusion

The record before me does not contain sufficient facts to determine whether, under the Administrator's Decision in *U.S. Pipe & Foundry Company*, the water quality standards at issue in this case are of the type which must be met by July 1, 1977, or whether they need only be implemented by that date. Moreover, as discussed below, the Administrator is presently reconsidering the correctness of his decision in the *U.S. Pipe* case.

Discussion

Section 301(b)(1)(C) of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) requires that:

"There shall be achieved . . . not later than July 1, 1977, any more stringent limitation including those necessary to meet water quality standards, treatment standards, or schedules of compliance, es-

tablished pursuant to any State law or regulations (under authority preserved by Section 510) or other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act."

The NPDES permit issued to Northern Indiana Public Service Company for its Bailly Generating Station requires compliance with thermal water quality standards by July 1, 1977. The company objects to this compliance date, relying on the Administrator's decision in the matter of *U.S. Pipe and Foundry Company*, October 10, 1975. The Region, on the other hand, argues that the Administrator's decision in that case is not controlling because "consistency from case to case is not necessarily required in administrative proceedings."

Without attempting to resolve the issue of the degree to which the Agency *must* adhere to positions taken in prior cases, it is clear that in this case at least the *U.S. Pipe* decision is relevant, and governing. The decision constitutes a formal interpretation of the FWPCA by the Administrator of the Agency. As such, it is to be followed until reversed by the Administrator or by a court of competent jurisdiction.

In *U.S. Pipe*, the Administrator concluded that the distinction between the words "meet" and "implement" in Section 301(b)(1)(C) was significant. Giving effect to the distinction, the Administrator held that water quality standards established under section 303 of the Act must be " 'implemented' (i.e. put into effect) by July 1, 1977, but such standards need not necessarily be 'met' by such date."

While not expressed in the *U.S. Pipe* decision, the corollary of the above principle is that effluent limitations necessary to meet water quality standards established pursuant to "any State law or regulations (under authority preserved by section 310) or any other Federal

law or regulation" (Section 301(b)(1)(C) *must* be achieved by July 1, 1977. Therefore, it is necessary to determine whether the thermal water quality standards upon which the compliance schedule in this case is based were established pursuant to section 303 of the FWPCA, as opposed to having been established pursuant to State or other Federal law. If so, the rule of *U.S. Pipe* would authorize the Regional Administrator to consider whether it is "appropriate" under the facts of this case to require that the water quality standards be implemented rather than actually met by July 1, 1977. If not, the Regional Administrator has no such authority.

The State of Alabama has challenged the Administrator's decision in *U.S. Pipe* in the U.S. Court of Appeals for the Fifth Circuit (*Alabama ex rel. Baxley v. EPA*, No. 75-4435).

The Agency's Assistant Administrator for Enforcement and its General Counsel have both petitioned the Administrator, on May 14, 1976, to reconsider his decision in *U.S. Pipe* insofar as it holds that some water quality standards need not be met by July 1, 1977. The reasons for the action of the General Counsel in joining that petition are set forth in a "Memorandum of Law in Support of Petition for Reconsideration" filed with the Administrator. A copy of that memorandum is attached.

The Administrator granted the Petition on May 18, 1976.

Accordingly, while the rule expressed in *U.S. Pipe* is still binding on the Agency, prudence would suggest deferring the decision in this case pending the Administrator's decision on reconsideration.

/s/ G. William Frick
G. WILLIAM FRICK
General Counsel

Dated: June 9, 1976

[Attachment to Decision of the General Counsel
on Matters of Law Pursuant to
40 C.F.R. Section 125.36(m), No. 42]

MEMORANDUM OF LAW IN
SUPPORT OF PETITION FOR RECONSIDERATION

Question Presented

Does section 301(b)(1)(C) distinguish between two types of effluent limitations, one based on water quality standards under State Law and other Federal law, which must be met by July 1, 1977, and the other based on water quality standards established under the 1972 Amendments to the Federal Water Pollution Control Act, which need not be met by July 1, 1977 as long as a schedule for meeting such standards is implemented by July 1, 1977?

Answer

No. More stringent effluent limitations based on any water quality standards must be achieved by July 1, 1977. By that date, effluent limitations must fully comply with water quality standards.

Discussion

The language of section 301(b) is clear:

> In order to carry out the objective of this Act there shall be *achieved* (c) *not later than July 1, 1977*, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act. (emphasis added)

The suggestion that Congress intended to distinguish between two sets of more stringent limitations is based primarily upon the presence of two terms in section 301(b)(1)(C): In the first instance, one phrase refers to effluent limitations necessary to *meet* certain water quality standards, while in the second it refers to limitations required to *implement* certain water quality standards. The Administrative Law Judge concluded that the use of two different words was intended to distinguish between the effect given to two different classes of water quality standards.

Yet the plain meaning of the phrase in question appears to be clear: "There shall be achieved . . . . not later than July 1, 1977, any more stringent limitation . . . . required to implement any applicable water quality standard established pursuant to this Act." Thus the limitation must be achieved by July 1, 1977. The Administrator's decision, however, ignored the use of the word "achieved" and instead emphasized the word implement. In essence, that decision first attempted to rewrite the statute to require that "there shall be implemented by July 1, 1977 any more stringent limitation necessary to ultimately meet water quality standards." The decision then attempted to define "implement" as merely putting into progress a schedule which would ultimately lead to compliance. Not only does such decision require the rewriting of the statute and the deletion of the word "achieved," it also requires a redefinition of the word "implement." The dictionary defines implement as "to fulfill, perform, carry out." Only as a secondary definition does it include "to put into effect according to or by means of a definite plan or procedure." (Random House Dictionary of the English Language p. 715) Even in this secondary definition, the operative words are *put into effect*, not put into a plan.

Any suggestion that Congress intended to distinguish between meet and implement and wished to extend the July 1, 1977 date for meeting effluent limitations based on certain water quality standards is negated by the legislative history of the 1972 Amendments to the Federal Water Pollution Control Act.

The original Senate bill, S. 2770, contained the following language in section 301(b)(1)(C):

> In order to carry out the purposes of this act there shall be achieved any more stringent effluent limitation, treatment standards, or schedule of compliance established pursuant to any other State or Federal law or regulation or required to implement any applicable water quality standard (i) established pursuant to the Federal Water Pollution Control Act prior to the date of enactment of this Act or (ii) for intrastate waters, established pursuant to State law.

Since the Senate bill contained no provision for water quality standards, there was no point in a requirement that limitations be required to implement water quality standards established under the Amendments. There is no suggestion in the legislative history as to why the Senate bill used the word implement rather than meet. Yet the use of implement rather than meet does make sense. As observed throughout the legislative history and in subsequent Court decisions (*See CPC International v. Train*, 515 F.2d 1032 (C.A. 8, 1975); *Dupont v. Train*, 8 ERC 1506 (C.A. 4, 1975)) the 1972 Amendments drastically rewrote the concept and enforcement mechanisms embodied in the 1965 Act. The new emphasis on technology-based effluent limitations rather than water quality standards was founded primarily upon the difficulty of enforcing water quality standards as applied to individual dischargers under the old Act. As the Court said in *CPC, supra*, in order to establish that a given polluter had violated the Federal water quality standards:

> A plaintiff had to cross a virtually unbridgable causal gap of demonstrating that the cause of the unacceptable water quality was the effluent being discharged by the defendant. (p. 1035)

The enforcement mechanism of the pre 1972 Act, the Court noted

> was so unwieldly that only one case had reached the courts in more than two decades. See S. Rep. No. 92-414, 92nd Congress, 1st Session (1971), reported in a Legislative History of the Water Pollution Control Act Amendments of 1972 at 1423 (1973) (p. 1036). (Hereafter *Legislative History*).

Thus, under the previous Act, it was almost impossible to determine whether any particular discharger was meeting or violating water quality standards. The Senate bill therefore did not suggest that individual dischargers should "meet" water quality standards. Rather, on any stream segment, the requirement was that the total effluent from all point and non-point sources be such as to meet water quality standards. The process included in section 303(e) of the 1972 Amendments for waste load allocations was to insure that water quality standards were met, not merely by any one discharger but by the sum of all discharges to a particular segment of water. Thus a limitation on any one discharger would be required not to "meet" water quality standards, but to do its share in insuring that water quality standards were implemented.

In its report, the Senate Public Works Committee emphasized the need to implement water quality standards swiftly.

> Section 301(b)(1)(C) provides adequate authority to apply new information to existing water quality requirements and upgrade effluent limits accordingly. In other words, wherever the Administrator determines that application of the best practicable treatment requirements of Phase I will not provide

for implementation of existing water quality standards for interstate or intrastate streams, he must tighten the requirements against a source of discharge or group of sources.

However, in those cases the Administrator must act quickly. The deadlines established to achieve effluent limitations are strict (*Legislative History*, at 1422.) (emphasis added)

The House bill, H.R. 11896, was based on the Senate bill, but provided for the continuation of the water quality standards program. Thus, the House Committee rewrote section 301(b)(1)(C) of the Senate bill to include limitations based upon water quality standards established under the new Act. The House bill provided that:

there shall be achieved . . .(C) not later than January 1, 1976, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, establish (sic) pursuant to any other State or Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

There is no explanation in the legislative history as to why the House Public Works Committee added the words "including those necessary to meet water quality standards." Perhaps it could have left out such phrase, or included the Senate language in regard to pre-1972 standards for interstate and intrastate waters. One can surmise, however, that the phrase was included to emphasize the Committee's concern with the maintenance and retention of a water quality standards program.

At any rate, it is clear that the Committee intended its language to be stronger and more demanding than the Senate bill and to provide for strict deadlines. The Committee Report emphasizes the need for limitations based

on water quality standards to meet the statutory deadlines:

Subsection (b) of section 301 establishes a technological basis for the determination of effluent limitations for any discharge of pollutants provided that such limitations, at a minimum, are when applied to all point sources, adequate to *meet* existing or new water quality standards as provided under section 303. (*Leg. History* at 787) (emphasis added)

The deadline for achieving effluent limitations based on water quality standards is clearly specified by the Committee in its report:

Subsection (b)(1)(C) of section 301 requires that any more stringent limitation than that established under section 301(b)(1)(A) and (B), including any necessary to meet water quality standards, treatment standards, or schedules of compliance established pursuant to any other State or Federal law or regulation or any required to implement any applicable water quality standards established pursuant to section 303 of this Act shall be met by January 1, 1976. The Committee intends that the water quality standards established pursuant to subsection (c) of section 10 of the existing Federal Water Pollution Control Act be complied with prior to January 1, 1976, in accordance with the implementation plans that are parts of such standards, or any revision of these standards made pursuant to section 303 of this Act, and that there be appropriate phrased compliance with revised or new standards adopted pursuant to section 303(c) of this Act, *not later than January 1, 1976.* (*Legislative History*, at p. 788) (emphasis added)

Congressman Blatnick, the Chairman of the House Public Works Committee, emphasized the need to require strict deadlines for limitations based on water quality standards:

I also have an answer for those who, because they feel that S.2770 imposes more stringent controls, would advocate that we adopt S.2770, as passed by the other body. Read section 303. Read section 301(b)(1)(C). These sections require point sources of the discharge of pollutants to install the "best practicable control technology currently available" by January 1, 1976. This is consistent with the other body. However, what if such control technology is inadequate to meet water quality standards as required by the Water Quality Act of 1965?

H.R. 11896 requires that if the application of "best practicable control technology currently available" is not sufficient to meet water quality standards further and more stringent controls must be imposed. This is more restrictive than the requirement of the other body, and it should be recognized as such. The requirements of H.R. 11896 will assure that, water quality standards are met, and that even if such "best practicable control technology currently available" is not sufficient to meet water quality standards, each point source will still be required to be so equipped to further enhance the quality of our waters. In other words we require the upgrading of our waters to a much greater degree than does S.2770. (*Legislative History*, at p. 353)

The conference bill, finally adopted in the act, is almost identical with the House version, except that it extends the compliance date from January 1, 1976 until July 1, 1977. In further House debate on the conference bill, Representative Harsha, one of the House managers, [and the ranking Republican on the Committee] again emphasized the strict time limits:

> Section 301(b)(1)(C) *requires that water quality standards shall be achieved not later than July 1, 1977.* The water quality standard requirements are not intended to be in lieu of the technological requirements for 1977 but are required to be the basis for water quality control if they are more stringent than the effluent limitations determined by "best practicable control technology currently available." For example, if there are a multitude of point sources on a given stretch of water, the potential of exceeding the water quality standards, exists even though each point source is meeting best practicable control technology. If "best practicable control technology" in this or in any other situation is inadequate to meet the water quality standards, the managers clearly intend that each point source shall be required to meet effluent limitations which would be consistent with the applicable water quality standard. (*Legislative History*, at 246) (emphasis added)

Thus the entire legislative history shows the clear intention of both houses of Congress that limitations based upon water quality standards were to be in compliance by July 1, 1977, the statutory deadline. There is no basis in the Legislative History for drawing a distinction between meet and implement.[1]

In addition, the Legislative History contains no rationale for distinguishing between types of water quality standards. There is no policy or pragmatic reason to suggest that standards established under state law or other Federal law are to be treated any differently than standards "established under this Act." Both the language of section 301(b)(1)(C) and the Legislative History strongly support the conclusion that more stringent limitations based on any and all water quality standards must be achieved, met, and fully implemented by July 1, 1977.

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[1] Since all more stringent limitations based on any water quality standards must be achieved by 1977, the consent decree (which only deals with limitations necessary to meet BPT) is not relevant to the imposition of limitations based upon water quality standards. See *U.S. v. Rohm & Haas Company*, 500 F.2d 167 (C.A. 5, 1974)

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN THE MATTER OF:

National Pollution Discharge
Elimination System

PERMIT FOR:

Northern Indiana Public Service Company
Bailly Generating Station
NPDES No. IN 0000132

NPDES Appeal No. 76-4

(NPDES-V-055 (AH))

DENIAL OF PETITION FOR REVIEW

On July 6, 1976, the Porter County Chapter of the Izaak Walton League of America, Inc. (hereinafter referred to as "Petitioner") and others filed a Petition asking that I review a portion of the decision of the General Counsel dated June 9, 1976 in the above-referenced matter. I am today denying the Petition.

Background

In the above-captioned proceedings, EPA's Region V is in the process of issuing a discharge permit under the National Pollution Discharge Elimination System established pursuant to the Federal Water Pollution Control Act, P.L. 92-500. The Presiding Officer below certified two issues of law to EPA's General Counsel for decision pursuant to 40 CFR 125.36(m).

The first issue was: "Whether the Permittee should be required to comply with the requirements of Public Law 89-298, Title III—Rivers and Harbors, Section 301, Navigation, paragraph captioned Burns Waterway Harbor, Indiana?" On June 9, 1976, the General Counsel answered the question in the negative in "Decision of the General Counsel on Matters of Law Pursuant to 40 CFR 125.36(m)—No. 42." The portion of this document dealing with the above-quoted issue shall hereinafter be referred to as "the Decision." (Petitioner does not challenge the General Counsel's resolution of the second issue.)

Petitioner argues that the Decision is inconsistent with the legislative history of Public Law 89-298, and is clearly erroneous; that the Permittee's facility borders on waters which are susceptible to severe ecological damage; and that an important decision or policy is therefore involved which warrants my review. The Petition has been filed pursuant to 40 CFR 125.36(n).

On July 19, 1976, the Enforcement Division of Region V filed a Memorandum arguing that I should deny the Petition without prejudice on the grounds that it is not ripe. The Enforcement Division Memorandum states that a stipulation in resolution of all factual issues has been executed by all parties, and that following certification by the Presiding Officer, the stipulation and the Decision will be submitted to the Regional Administrator for use in rendering an Initial Decision.

The Enforcement Division Memorandum argues that my review authority under 40 CFR 125.36(n) "arises only after the Regional Administrator's Initial Decision." This argument is based upon 40 CFR 125.36(m)(4), which provides that General Counsel decisions "shall be relied upon by the Regional Administrator in rendering the Initial Decision", and 40 CFR 125.36(n)(1), which

allows appeal of a General Counsel decision "relied upon by the Regional Administrator in rendering the Initial Decision."

Disposition of Petition

Although 40 CFR 125.36 fails to provide explicit guidance on this point,[1] I agree with Region V's Enforcement Division that an appeal of a General Counsel decision should not be filed until the Regional Administrator has issued an Initial Decision. I will nevertheless exercise my inherent discretion to entertain the instant Petition now, since Petitioner has taken the time and trouble to file it, since the provisions of 40 CFR 125.36(n) leave some room for interpretation, and since the Decision for which review is sought will undergo no further refinements prior to the Initial Decision.[2]

Turning to the merits of the substantive issue presented, the General Counsel concluded after a well-reasoned analysis that Public Law 89-298 has no applicability in establishing effluent limitations for the NPDES permit at issue here. I can perceive no flaw in the analysis of the Decision; indeed, it seems that the relevant terms of Public Law 89-298 permit no

[1] A regulatory provision not cited in the Enforcement Division memorandum, 40 CFR 125.36(n)(3), further implies that 40 CFR 125.36 contemplates petitions for review after an Initial Decision.

[2] I hereby direct the Office of Water Enforcement to consider whether amendments to 40 CFR 125.36(n) would be appropriate to provide clearer notice that decisions of the General Counsel should be appealed only upon issuance of an Initial Decision. The confusion on this point seems to be largely caused by the failure of some EPA regions to issue a clearly identifiable "Initial Decision" after parties have executed a stipulation of facts. See my Denial of Petition for Review in NPDES Appeal No. 75-10 (Collier Carbon and Chemical Corporation), issued today, pages 2-3.

reasonable construction other than that reached in the Decision.

Since the Petition has made no showing that the Decision is clearly erroneous or contains an important policy question warranting my review, I hereby deny the Petition.

/s/ Russell E. Train
RUSSELL E. TRAIN

Dated: August 10, 1976

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Permit No. IN 0000132

Application No. IN 070 0X3 2 720202

AUTHORIZATION TO DISCHARGE UNDER THE

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 125l et seq; the "Act"),

NORTHERN INDIANA PUBLIC SERVICE COMPANY

is authorized by the United States Environmental Protection Agency, Region V,

to discharge from a facility located at Bailly Generating Station
Chesterton, Indiana

to receiving waters named Lake Michigan

in accordance with effluent limitations, monitoring requirements and other conditions set forth in Parts I, II, and III hereof.

This permit and the authorization to discharge shall expire at midnight, August 31, 1979 . Permittee shall not discharge after the above date of expiration. In order to receive authorization to discharge beyond the date of expiration, the permittee shall submit such information, forms, and fees as are required by the Agency authorized to issue NPDES permits no later than 180 days prior to the above date of expiration.

This permit, revised following a request for adjudicatory hearing pursuant to 40 CFR 125.36, which proceeding has been resolved in accordance with all applicable regulations, is effective on this date of signature and supersedes NPDES Permit number IN 0000132 dated October 13, 1974 .

Signed this DEC 7 1976

Director, Enforcement Division

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Permit No. IN 0000132

AS MODIFIED DEC 7 1976

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

1. During the period beginning on the effective date and lasting until June 30, 1977, the permittee is authorized to discharge from outfall(s) serial number(s) 001.

Such discharges shall be limited and monitored by the permittee as specified below:

EFFLUENT CHARACTERISTIC	DISCHARGE LIMITATIONS kg/day (lbs/day) Daily Avg	Daily Max	Other Units (Specify) Daily Avg	Daily Max	MONITORING REQUIREMENTS Measurement Frequency	Sample Type
Flow-M³/Day (MGD)	-	-	-	-	Continuous (Estimate)	-
Temperature	-	-	-	-	Continuous	-
Total Residual Chlorine*	-	-	-	-	Weekly	Grab
Duration of Chlorination	-	-	-	-	Monthly	Report
Frequency of Chlorination	-	-	-	-	Monthly	Report
Heat Rejection Rate KJ/hr. (BTU/hr.)	-	-	-	-	Monthly Average	Report
Plant Capacity, % Total Capacity	-	-	-	-	Monthly Average	Report

* To be sampled during chlorine application period.

The pH shall not be less than 6.5 nor greater than 9.0 or the pH of the intake, whichever is greater and shall be monitored by weekly grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s): At a point representative of the discharge but prior to entry into Lake Michigan water.

Permit No. IN 0000132

AS MODIFIED DEC 7 1976

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

2. During the period beginning July 1, 1977 and lasting until August 31, 1979, the permittee is authorized to discharge from outfall(s) serial number(s) 001.

Such discharges shall be limited and monitored by the permittee as specified below:

EFFLUENT CHARACTERISTIC	DISCHARGE LIMITATIONS kg/day (lbs/day) Daily Avg	kg/day (lbs/day) Daily Max	Other Units (Specify) Daily Avg	Other Units (Specify) Daily Max	MONITORING REQUIREMENTS Measurement Frequency	Sample Type
Flow-M^3/Day (MGD)	-	-	-	-	Continuous (Estimate)	
Temperature	-	-	-		Continuous	-
Total Chlorine Residual*	-	-	-	0.2 mg/l	Daily	Grab
Duration of Chlorination	-	-	-	-	Monthly	Report
Frequency of Chlorination	-	-	-	-	Monthly	Report
Heat Rejection Rate KJ/hr. (BTU/hr.)	-	-	-	-	Monthly Average	Report
Plant Capacity, % Total Capacity	-	-	-	-	Monthly Average	Report

* Discharge of total chlorine residual not to exceed 5 minutes per unit every four hours without regard to plume temperature.

The pH shall not be less than 6.5 nor greater than 9.0 or the pH of the intake, whichever is greater and shall be monitored by monthly grab sample.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s): At a point representative of the discharge but prior to entry into Lake Michigan water.

Permit No. IN 0000132

AS MODIFIED DEC 7 1976

PART I

A. EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

3. During the period beginning on the effective date and lasting until August 31, 1979, the permittee is authorized to discharge intake deicing water.

Such discharges shall be limited and monitored by the permittee as specified below:

EFFLUENT CHARACTERISTIC	DISCHARGE LIMITATIONS kg/day (lbs/day) Daily Avg	kg/day (lbs/day) Daily Max	Other Units (Specify) Daily Avg	Other Units (Specify) Daily Max	MONITORING REQUIREMENTS Measurement Frequency	Sample Type
Flow-M^3/Day (MGD)	-	-	-	-	Continuous (Estimate)*	
Temperature	-	-	-	-	Continuous *	-

* When discharging.

There shall be no discharge of floating solids or visible foam in other than trace amounts.

Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location(s): At a point representative of discharge.

If the Permittee after monitoring for at least 6 months determines that he is consistently meeting the effluent limits contained herein, the Permittee may request of the Regional Administrator and the Director that the monitoring requirements be reduced to twice or once per month or be eliminated. Upon written notification by the Regional Administrator and the Director, the Permittee will monitor as directed.

B. MONITORING AND REPORTING

1. Representative Sampling

Samples and measurements taken as required herein shall be representative of the volume and nature of the monitored discharge.

2. Reporting

Monitoring results obtained during the previous three months shall be summarized and reported on a State of Indiana monitoring form (DMR-1), postmarked no later than the 28th day of the month following the completed reporting period. The first report is due on January 28, 1977 . Duplicate signed copies of these, and all other reports required herein, shall be submitted to the Regional Administrator and the State at the following addresses:

U. S. Environmental Protection Agency
Region V, Enforcement Division
230 South Dearborn Street
Chicago, Illinois 60604
ATTN: Chief, Compliance Unit

Indiana Stream Pollution Control Board
1330 West Michigan Street
Indianapolis, Indiana 46206

3. Definitions

a. "Daily Average" Discharge

1. Weight Basis - The "daily average" discharge means the total discharge by weight during a calendar month divided by the number of days in the month that the production or commercial facility was operating. Where less than daily sampling is required by this permit, the daily average discharge shall be determined by the summation of the measured daily discharges by weight divided by the number of days during the calendar month when the measurements were made.

2. Concentration Basis - The "daily average" concentration means the arithmetic average (weighted by flow value) of all the daily determinations of concentration made during a calendar month. Daily determinations of concentration made using a composite sample shall be the concentration of the composite sample. When grab samples are used, the daily determination of concentration shall be the arithmetic average (weighted by flow value) of all the samples collected during the calendar day.

b. "Daily Maximum" Discharge

1. Weight Basis - the "daily maximum" discharge means the total discharge by weight during any calendar day.

2. Concentration Basis - the "daily maximum" concentration means the daily determination of concentration for any calendar day.

4. Test Procedures

Test procedures for the analysis of pollutants shall conform to regulations published pursuant to Section 304(g) of the Act, under which such procedures may be required.

5. Recording of Results

For each measurement or sample taken pursuant to the requirements of this permit, the permittee shall record the following information:

a. The exact place, date, and time of sampling;

b. The dates the analyses were performed;

c. The person(s) who performed the analyses;

d. The analytical techniques or methods used; and

e. The results of all required analyses.

6. Additional Monitoring by Permittee

If the permittee monitors any pollutant at the location(s) designated herein more frequently than required by this permit, using approved analytical methods as specified above, the results of such monitoring shall be included in the calculation and reporting of the values required in the Discharge Monitoring Report From (EPA No. 3320-1). Such increased frequency shall also be indicated.

7. Records Retention

All records and information resulting from the monitoring activities required by this permit including all records of analyses performed and calibration and maintenance of instrumentation and recordings from continuous monitoring instrumentation shall be retained for a minimum of three (3) years, or longer if requested by the Regional Administrator or the State water pollution control agency.

C. SCHEDULE OF COMPLIANCE

1. The permittee shall achieve compliance with the effluent limitations specified for discharges in accordance with the following schedule:

   a. Compliance Schedule for Miscellaneous Wastes and Meeting of Thermal Water Quality Standards

      Operational Level attained by - July 1, 1977

   b. Compliance Schedule for Meeting Chlorine Limitations

      Operational Level attained by - July 1, 1977

2. No later than 14 calendar days following a date identified in the above schedule of compliance, the permittee shall submit either a report of progress or, in the case of specific actions being required by identified dates, a written notice of compliance or noncompliance. In the latter case, the notice shall include the cause of non-compliance, any remedial actions taken. and the probability of meeting the next scheduled requirements.

PART II

MANAGEMENT REQUIREMENTS

1. Change in Discharge

   All discharges authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant identified in this permit more frequently than or at a level in excess of that authorized shall constitute a violation of the permit. Any anticipated facility expansions, production increases, or process modifications which will result in new, different, or increased discharges of pollutants must be reported by submission of a new NPDES application or, if such changes will not violate the effluent limitations specified in this permit, by notice to the permit issuing authority of such changes. Following such notice, the permit may be modified to specify and limit any pollutants not previously limited.

2. Noncompliance Notification

   If, for any reason, the permittee does not comply with or will be unable to comply with any daily maximum effluent limitation specified in this permit, the permittee shall provide the Regional Administrator and the State with the following information, in writing, within five (5) days of becoming aware of such condition:

   a. A description of the discharge and cause of noncompliance; and

   b. The period of noncompliance, including exact dates and times; or, if not corrected, the anticipated time the noncompliance is expected to continue, and steps being taken to reduce, eliminate and prevent recurrence of the noncomplying discharge.

3. Facilities Operation

   The permittee shall at all times maintain in good working order and operate as efficiently as possible all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

4. Adverse Impact

The permittee shall take all reasonable steps to minimize any adverse impact to navigable waters resulting from noncompliance with any effluent limitations specified in this permit, including such accelerated or additional monitoring as necessary to determine the nature and impact of the noncomplying disharge.

5. Bypassing

Any diversion from or bypass of facilities necessary to maintain compliance with the terms and conditions of this permit is prohibited, except (i) where unavoidable to prevent loss of life or severe property damage, or (ii) where excessive storm drainage or runoff would damage any facilities necessary for compliance with the effluent limitations and prohibitions of this permit. The permittee shall promptly notify the Regional Administrator and the State in writing of each such diversion or bypass.

6. Removed Substances

Solids, sludges, filter backwash, or other pollutants removed from or resulting from treatment or control of wastewaters shall be disposed of in a manner such as to prevent any pollutant from such materials from entering navigable waters.

7. Power Failures

In order to maintain compliance with the effluent limitations and prohibitions of this permit, the permittee shall either:

a. In accordance with the Schedule of Compliance contained in Part I, provide an alternative power source sufficient to operate the wastewater control facilities;

or, if no date for implementation appears in Part I,

b. Halt, reduce or otherwise control production and/or all discharges upon the reduction, loss, or failure of one or more of the primary sources of power to the wastewater control facilities.

B. RESPONSIBILITIES

1. Right of Entry

The permittee shall allow the head of the State water pollution control agency, the Regional Administrator, and/or their authorized representatives, upon the presentation of credentials:

a. To enter upon the permittee's premises where an effluent source is located or in which any records are required to be kept under the terms and conditions of this permit; and

b. At reasonable times to have access to and copy any records required to be kept under the terms and conditions of this permit; to inspect any monitoring equipment or monitoring method required in this permit; and to sample any discharge of pollutants.

2. Transfer of Ownership or Control

In the event of any changes in control or ownership of facilities from which the authorized discharges emanate, the permittee shall notify the succeeding owner or controller of the existence of this permit by letter, a copy of which shall be forwarded to the Regional Administrator and the State water pollution control agency.

3. Availability of Reports

Except for data determined to be confidential under Section 308 of the Act, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the State water pollution control agency and the Regional Administrator. As required by the Act, effluent data shall not be considered confidential. Knowingly making any false statement on any such report may result in the imposition of criminal penalties as provided for in Section 309 of the Act.

4. Permit Modification

After notice and opportunity for a hearing, this permit may be modified, suspended, or revoked in whole or in part during its term for cause including, but not limited to, the following:

a. Violation of any terms or conditions of this permit;

b. Obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or

c. A change in any condition that requires either a temporary or permanent reduction or elimination of the authorized discharge.

5. Toxic Pollutants

Notwithstanding Part II, B-4 above, if a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under Section 307(a) of the Act for a toxic pollutant which is present in the discharge and such standard or prohibition is more stringent than any limitation for such pollutant in this permit, this permit shall be revised or modified in accordance with the toxic effluent standard or prohibition and the permittee so notified.

6. Civil and Criminal Liability

Except as provided in permit conditions on "Bypassing" (Part II, A-5) and "Power Failures" (Part II, A-7), nothing in this permit shall be construed to relieve the permittee from civil or criminal penalties for noncompliance.

7. Oil and Hazardous Substance Liability

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under Section 311 of the Act.

8. State Laws

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State law or regulation under authority preserved by Section 510 of the Act.

9. Property Rights

The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights, nor any infringement of Federal, State or local laws or regulations.

10. Severability

The provisions of this permit are severable, and if any provision of this permit, or the application of any provision of this permit to any circumstance, is held invalid, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

PART III

OTHER REQUIREMENTS

1. Thermal Effluent Limitations and Monitoring Requirements

a. During the period beginning July 1, 1977, and lasting until August 31, 1979, the permittee is authorized to discharge from outfall 001 a heated effluent which shall at no time raise the natural temperature of Lake Michigan more than 3°F at a maximum distance of 1,000 feet from a fixed point adjacent to the point of discharge or as agreed upon by the State and Federal regulatory agencies. In addition, the water temperature outside the mixing zone shall not exceed the maximum limits indicated in the following table:

MAXIMUM TEMPERATURE LIMITS °F(°C)

JAN	FEB	MAR	APR	MAY	JUNE	JULY	AUG	SEPT	OCT	NOV	DEC
45 (7.2)	45 (7.2)	45 (7.2)	55 (12.8)	60 (15.6)	70 (21.1)	80 (26.7)	80 (26.7)	80 (26.7)	65 (18.3)	60 (15.6)	50 (10)

b. The mixing zone shall not include fish spawning or fish nursery areas nor interfere with fish migratory routes.

c. In addition, the permittee shall perform the following thermal monitoring:

The permittee shall determine the △ 3°F contour of the mixing zone once every three months for one year or until the contour has been established for representative operational and seasonal conditions and report it to the Regional Administrator and the Indiana Stream Pollution Control Board.

d. The thermal limitations specified above may be revised pursuant to § 316(a) of the Act.

2. Miscellaneous Plant Wastes

During the period beginning on July 1, 1977, and lasting until August 31, 1979, discharges from contaminated plant drains, oil sumps, contaminated plant service water returns, and water treatment plant wastes shall be collected and treated, if necessary, to achieve the following limits prior to combining with cooling and blowdown water.

Effluent Characteristic	Discharge Limitations Daily Ave.	Daily Max.	Monitoring Requirements Measurement Frequency	Sample Type
Flow	-	-	Continuous*	-
Suspended Solids	20 mg/l	30 mg/l	Weekly*	8 hr. Composite
Oil and Grease	10 mg/l	15 mg/l	Weekly*	Grab

* When discharging

3. Intake Structures

The permittee shall submit a final intake study report to the Regional Administrator and to the Indiana Stream Pollution Control Board by no later than January 15, 1977, providing proposals for measures to be taken by the permittee to meet the requirments of Section 316(b) of the Act for the best cooling-water intake technology available. Development of the report shall be guided by the "Development Document for Best Technology Available for Minimizing Adverse Environmental Impact for Cooling Water Intake Structures," as proposed by the U. S. EPA.

This report shall be evaluated with regard to Section 316(b) of the Act. As a result of this evaluation, the Regional Administrator may modify the permit in accordance with Part II. B.4. to establish an implementation schedule to insure compliance with Section 316(b).

PART III AS MODIFIED DEC 7 1976

OTHER REQUIREMENTS (cont.)

4. State Requirements

Notwithstanding any provision to the contrary elsewhere in this permit, the following conditions shall apply:

a. The company must submit the State monitoring forms monthly to the Indiana Stream Pollution Control Board. Submission must be made by the 28th of the following month.

b. Preliminary plans and specifications and final plans and specifications pursuant to the Schedule of Compliance, shall be submitted to the State agency for approval.

5. Transformer Fluids

There shall be no discharge of polychlorinated biphenyl transformer fluids.

6. Permittee shall monitor, on a representative basis,the discharge of parking lot run-off through the pipe which enters interdunal Pond A. Permittee shall also operate a treatment mechanism for this pipe which is described in Exhibit A to the Stipulation in resolution of the adjudicatory hearing in this matter. Monitoring results shall be submitted in accordance with Part I.B.2. of the Permit.

Supreme Court, U.S.
FILED
SEP 1 1978
MICHAEL RODAK, JR., CLERK

No. 77-1798

In the Supreme Court of the United States

OCTOBER TERM, 1978

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., ET AL., PETITIONERS

v.

DOUGLAS COSTLE, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 571 F. 2d 359. The opinion of the Administrator of the Environmental Protection Agency (Pet. App. 36-39) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1978. A petition for rehearing was denied on March 20, 1978. The petition for a writ of certiorari was filed on June 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Public Law 89-298,[1] which authorized construction of the Burns Waterway Harbor, requires the Administrator of the Environmental Protection Agency to include in a discharge permit issued to the Northern Indiana Public Service Company effluent limitations more stringent than those required by Section 301(b)(1) of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311(b)(1).

STATUTES INVOLVED

The relevant portions of Public Law 89-298 (79 Stat. 1091) are set forth at Pet. 13a-14a. The relevant portion of Section 301 of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311, is set forth at Pet. 12a.

STATEMENT

On October 31, 1974, pursuant to Section 402 of the Federal Water Pollution Control Act (FWPCA), as added, 86 Stat. 880, 33 U.S.C. (Supp. V) 1342, the regional office of the Environmental Protection Agency (EPA) issued a National Pollutant Discharge Elimination System (NPDES) permit to the Northern Indiana Public Service Company (NIPSCO) for its coal-fired Bailly generating station adjacent to Burns Harbor, Indiana (Pet. App. 2). The permit required NIPSCO to meet certain effluent limitations and other special conditions. NIPSCO then requested an adjudicatory hearing on certain questions regarding the permit, and petitioners requested and were granted party status for the hearing (Pet. App. 3).

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[1]The Act of October 27, 1965, 79 Stat. 1073. Because petitioners and the court of appeals refer to this Act as Public Law 89-298, we do the same to avoid confusion.

Pursuant to 40 C.F.R. 125.36(m), the officer presiding at the hearing certified to the General Counsel of EPA the question whether Public Law 89-298, which authorized the construction of the Burns Waterway Harbor on the shore of Lake Michigan, should have been applied to affect the effluent limitations in the NIPSCO permit. Section 301 of Public Law 89-298[2] provides in pertinent part:

> The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor.

The General Counsel concluded that Public Law 89-298 was not applicable to the effluent limitations in NIPSCO's permit (Pet. App. 22-35). Petitioners filed a petition seeking review by the Administrator of EPA, who concluded that "the relevant terms of Public Law 89-298 permit no reasonable construction other than that reached in the [General Counsel's] Decision" (Pet. App. 38-39). Accordingly, the Administrator denied the petition (Pet. App. 39).

The parties to the adjudicatory hearing then entered into a stipulation that resolved factual issues and preserved legal questions pertaining to Public Law 89-298 (Pet. App. 5). On December 7, 1976, in accordance with the stipulation, EPA issued a permit to NIPSCO superseding the 1974 permit (Pet. App. 40-56).

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[2]79 Stat. 1091.

Pursuant to Section 509(b)(1)(F) of the Federal Water Pollution Control Act, as added, 86 Stat. 891, 33 U.S.C. (Supp. V) 1369(b)(1)(F), petitioners sought review of the Administrator's issuance of the NIPSCO permit in the court of appeals.[3] After consideration of Public Law 89-298 and the applicable legislative history, the court concluded that the Act imposed no limitations on the NIPSCO permit. The court pointed out that "the public law does not articulate any specific standard" but "voices only a broadly stated objective, which gives the Secretary of the Army authority to exercise his discretion in obtaining assurances from Indiana of 'maximum feasible' pollution control in Burns Harbor" (Pet. App. 13).

The court also noted that the Public Law's directive to obtain assurances from the State was addressed to the Secretary of the Army, not to the Administrator of EPA (Pet. App. 10). Moreover, the Secretary was not authorized to promulgate standards, but only to seek assurances from the State (*ibid.*). The court concluded that the Secretary had received such assurances, and thus that Public Law 89-298 required nothing more (*id.* at 13-14). Finally, the court also noted that even if EPA were required to apply Public Law 89-298 in issuing the NIPSCO permit, petitioners still would not be entitled to relief, since they had made no showing that any requirements based on the Public Law would be more stringent than those already applied under the FWPCA (*id.* at 16-18). Accordingly, the court dismissed the petition and affirmed the Administrator's decision (*id.* at 18).

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[3]Petitioners also sought review of the Administrator's decision upholding the General Counsel's determination, and the two petitions were consolidated for review; the court concluded that it was unnecessary to consider whether the petition to review the Administrator's earlier decision was permature, since the court had jurisdiction to review the issuance of the permit (Pet. App. 5).

ARGUMENT

1. Petitioners contend (Pet. 10-11) that the court of appeals erred in interpreting the objective of "maximum extent feasible" in Public Law 89-298 as no more stringent than the standard "best practicable control technology currently available" in Section 301(b)(1)(A) of the Federal Water Pollution Control Act, as added, 86 Stat. 844, 33 U.S.C. (Supp. V) 1311(b)(1)(A). Petitioners urge that the interpretation of a technical standard is an administrative function within the expertise of EPA, and they seek a remand to require the EPA to interpret the provision in Public Law 89-298.

This argument is without merit. The portion of the court's opinion in which petitioners contend that the court interpreted the statutory objective "maximum extent feasible" follows the court's holding that Public Law 89-298 imposes no standards applicable to the NIPSCO permits. In dictum the court noted (Pet. App. 16) that even "[i]f we assume arguendo" that the Public Law was applicable, the result would be the same. This hypothetical argument was not necessary to the court's decision, and it neither requires a remand to the EPA nor warrants review by the Court.

2. Petitioners also contend (Pet. 11-12) that the court of appeals' decision rests on the erroneous premise that Public Law 89-298 was to be enforced by the Secretary of the Army, not the Administrator of EPA. Petitioners urge that Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. (Supp. V) 1342, designated the Administrator of EPA as the exclusive authority to issue permits for discharges into navigable waters, transferring to him the authority formerly exercised by the Secretary of the Army under Section 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407.

This argument is insubstantial. Congress's transfer of certain environmental protection functions from the Secretary of the Army to the Administrator of EPA did not alter the terms of Public Law 89-298. As the court of appeals correctly concluded, the Public Law expressly directed the Secretary of the Army, who was responsible for the construction of the Burns Waterway Harbor, to obtain certain assurances from State authorities regarding the control of pollution that might affect nearby recreational areas. Public Law 89-298 did not require EPA to include more stringent limitations in discharge permits issued pursuant to the Federal Water Pollution Control Act.

3. The court of appeals construed a narrow statutory provision applicable only to a single harbor construction project. The court's decision was correct, and it presents no issue of general importance warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1978.

DOJ-1978-08

No. 77-1798

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ, *Petitioners*,

v.

DOUGLAS COSTLE, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT NORTHERN INDIANA PUBLIC SERVICE COMPANY IN OPPOSITION

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July 1978

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1798

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; SAVE THE DUNES COUNCIL, INC.; ANN SIMS and HERBERT P. READ, *Petitioners,*

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BRIEF FOR RESPONDENT NORTHERN INDIANA PUBLIC SERVICE COMPANY IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals for the Seventh Circuit are reported at 571 F.2d 359, and are set out in the Appendix at pages 1-20.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1978. A petition for rehearing was de-

nied on March 20, 1978 (App. p. 21). The petition for certiorari was filed on June 19, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Do the provisions of Public Law 89-298, concerning Burns Waterway Harbor, impose limits on the Administrator of the Environmental Protection Agency in issuing a permit under the Federal Water Pollution Control Act?

STATUTES INVOLVED

The relevant provisions of Public Law 89-298 of October 27, 1965 (79 Stat. 1073) and of the Federal Water Pollution Control Act of 1972 (33 U.S.C. Secs. 1251 *et seq.*) are set forth in the petition Appendix at pages 13a-14a and 1a-12a, respectively.

STATEMENT

On October 31, 1974 the Regional Office of the United States Environmental Protection Agency (EPA) issued, pursuant to Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. § 1342 (P. App. pp. 4a-11a), a National Pollutant Discharge Elimination System (NPDES) permit to respondent Northern Indiana Public Service Company (NIPSCO), for its coal-fired generating plant adjacent to Burns Harbor, Indiana, subject to certain special conditions and effluent limitations. Pursuant to 40 C.F.R. §§ 125.36 *et seq.*, NIPSCO filed a request for an adjudicatory hearing, which was granted, and petitioners herein were admitted as parties.

At a prehearing conference, the present petitioners raised, as a legal issue, the question now involved in

the petition for certiorari—whether Public Law 89-298 had any applicability in connection with the permit application.

Public Law 89-298, an omnibus public works measure, contains in Section 301, with respect to the Burns Waterway Harbor, the following reference to pollution:

> ". . . The State of Indiana shall furnish assurance satisfactory to the Secretary of the Army that water and air pollution sources will be controlled to the maximum extent feasible in order to minimize any adverse effects on public recreational areas in the general vicinity of the Harbor. . . ."

Petitioners asserted (a) that the words "to the maximum extent feasible" set more stringent requirements than the "best practicable control technology currently available" mandated by Section 301(b)(1)(A) of the Water Pollution Control Act [1] and (b) that the Administrator was required by the provision of Section 301 (b)(1)(C), which requires the applicant for a permit to meet "any more stringent limitations, including those necessary to meet water quality standards, treatment standards, or schedules of compliance" established by any other State or Federal law, to apply those requirements in ruling on NIPSCO's application for a permit.

Pursuant to 40 C.F.R. Sec. 125.36(m), the question was certified to the General Counsel of EPA, who ruled that Public Law 89-298 had no application (App. pp. 22-25). On August 10, 1976 the Administrator declined

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[1] By 1983, Section 301b)(2)(A), the standard will be "the best available technology economically achievable."

to review the General Counsel's decision (App. pp. 36-39).

On October 7, 1976 the Regional Administrator issued the initial decision authorizing the issuance of an amended permit to NIPSCO, and approved a stipulation entered into by the parties which resolved factual issues and preserved the legal question pertaining to Public Law 89-298. Pursuant to 40 C.F.R. 125.36(1)(4), that decision became the decision of the agency ten days later, and on December 7, 1976 the permit (set out in the Appendix at pages 40-56) was formally issued. The petition to review that action was filed in the court below March 7, 1976.[2]

The court below, after a full review of the legislative history of the Burns Waterway Harbor legislation, concluded that Public Law 89-298 "does not contain a specific standard and does not give the Secretary of the Army authority to promulgate precise standards" (App. p. 12), but only "voices a broadly stated objective," which gives the Secretary of the Army authority to exercise his discretion in obtaining assurances from Indiana of "maximum feasible pollution control in Burns Harbor" (*ibid.*). These assurances, the court pointed out, have been received and hence, "the Secretary's acceptance of Indiana's submission is the end of the matter as regards the applicability of Public Law 89-298" (App. pp. 13-14). The court went on to say that even were Public Law 89-298 to be applied, it would not change the result, since petitioners "have made no showing" that any requirement based on the

[2] Petitioners had earlier filed a petition to review the Administrator's decision of August 10, 1976. The two petitions were consolidated for hearing and decision by the court below.

public law would be more stringent than the "best practical control technology currently available" (App. pp. 16-17). Chief Judge Fairchild, dissenting, would have remanded the matter to the EPA to determine whether the public law standard is indeed more stringent (App. pp. 19-20).

ARGUMENT

As is apparent from the Statement, *supra,* the question involved in the present case is essentially unique to the permit in issue. There is no conflict of decisions, nor can the issue be fairly characterized as an important question of federal law that should be settled by a decision of this Court.

Indeed, petitioners appear to avoid even a challenge to the conclusion of the majority below that Public Law 89-298, as shown by both its language and its legislative history, was a directive to the Secretary of the Army which the Secretary duly carried out, and has no application to the responsibilities of the Administrator. Instead, petitioners direct their arguments to a dictum, appearing at the conclusion of the majority opinion (App. pp. 10-11) that even were Public Law 89-298 applicable, petitioners had failed to show that any requirements based on it would be more stringent.

The dictum accurately reflects the facts, and can in no way support petitioners' assertion that the court has so far departed from the accepted course of judicial proceedings as to warrant review by this Court. More importantly, that challenge does not apply in any way to the *decision* of the court below, that the Administrator had correctly decided that Public Law 89-298 has no application to NIPSCO's application.

There is no need to repeat here the detailed review in the opinion below of both the circumstances surrounding the "port-park" controversy concerning Indiana's Lake Michigan shoreline, and the legislative history of Public Law 89-298. Suffice it to say that both the text of the public law and the record made during the course of its enactment amply support the conclusion of the majority below (App. p. 15):

> "It gave a directive to the Secretary of the Army, not to the Administrator of EPA. The Act left the matter to the Secretary's discretion; it did not authorize him, and certainly not the Administrator, to promulgate standards. He was to receive assurances of pollution control prior to the construction of the harbor and that was to be the end of the matter. He was not authorized to demand assurances indefinitely. In our opinion, it would be judicial legislation to find that Congressional policy requires EPA to act in a situation and in a manner clearly not contemplated by the language of Public Law 89-298 or its legislative history."

It can be added, as the court below also pointed out (App. pp. 12-13), that the words of Public Law 89-298 are a "broadly stated objective," and neither contain a specific standard nor authorize the Secretary of the Army to promulgate precise standards. Without further definition, its words establish no enforceable requirement. Section 301(b)(1)(C), which refers to "water quality standards, treatment standards, or schedules of compliance" is simply not applicable.

CONCLUSION

The decision below is correct. It involves no conflict with the decision of any other court, and no question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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